

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
I.O. LIMITED PARTNERSHIP, L.L.L.P.
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Zoning Application No. G-788

Before: Philip J. Tierney and Françoise M. Carrier, Hearing Examiners

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HEARING EXAMINERS' REPORT AND RECOMMENDATION

I. SUMMARY

The proposal involves a 1.6-acre parcel situated in Germantown at the juncture of MD Route 118 and Bowman Mill Drive in a transitional area located between the Germantown Historic District and Town Center core areas. This transitional area contains significant historic resources and is characterized as quiet, passive and pedestrian oriented. There is no direct access to the property from Route 118. Primary access would be by way of Bowman Mill Drive, a road constructed for the purpose of providing access for commuters to the adjacent Maryland Area Rail Commuter (MARC) train parking lots.

The application is subject to a schematic development plan (SDP) filed under the optional method of application, which affords an applicant the opportunity to limit land uses, density, and development standards and provide staging. The Applicant proposes to build a 3,100-square-foot structure under the C-3 Zone, which could house a convenience store and automobile filling station that would operate on a 24-hour a day basis. The automobile filling station is subject to approval by the Board of Appeals under a post-zoning special exception process. In this case, some of the uses allowed under the C-3 Zone are restricted and the SDP contains binding development standards that exceed the minimum requirements of the zone. The Applicant intends that the structure will be architecturally compatible with the area, but the zoning process does not provide design controls that would assure this result. There are several deficiencies in the SDP and a related declaration of covenants that require correction before the application could be favorably considered. However, there are more serious deficiencies with the application that render it unacceptable.

While the proposed use contains many desirable features that would be an acceptable use at another location, the subject property is an inappropriate location for the C-3 Zone. The Applicant has not presented sufficient evidence to permit affirmative findings that the request meets the locational standards for the C-3 Zone, that the use would be compatible with existing and planned uses in the

surrounding areas, and that the use bears sufficient relationship to the public interest to justify its approval.

With respect to the public interest determination, the District Council normally considers conformity with the applicable master plan, recommendations of the Planning Board and Technical Staff and impact on public facilities. In this regard the application is contrary to the recommendations of the master plan and did not receive favorable recommendations from the Planning Board and Technical Staff. In addition, the Applicant neglected to provide adequate evidence to show that traffic generated by the proposed development can access the site by way of Bowman Mill Drive in a safe, adequate and efficient manner without adverse impact on existing traffic that uses the road for access to the MARC commuter parking lots. The evidence also indicates that the proposed development will contribute to adverse impacts on several area intersections and the Applicant failed to provide any binding commitment to provide staging until necessary mitigation is provided to offset the impact of the development.

For these reasons, it is recommended that the application for the C-3 Zone at this location be denied.

II. STATEMENT OF THE CASE

Zoning Application No. G-788, filed January 11, 2001, requests reclassification from the O-M and R-200 Zones to the C-3 (Highway Commercial) Zone of 1.6 acres known as Lot 1, Block A, Bowman Mill Subdivision, located at the southeast quadrant of the intersection of relocated MD Route 118 and Bowman Mill Drive, Germantown, in the 9th Election District. The application was filed under the Optional Method authorized under §59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging.

The application was initially reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated May 4, 2001, recommended denial. On May 10, 2001, three members of the Planning Board considered the application and by a

two-to-one vote, recommended denial. At the request of the Applicant the Planning Board was requested to reconsider this matter on two occasions, but the Board declined to do so. A public hearing was convened on May 15, 2001 and continued over to June 15, July 24, September 11 and 12, and October 23, 2001. The record closed at the conclusion of the hearing on October 23, 2001.

III. FINDINGS OF FACT

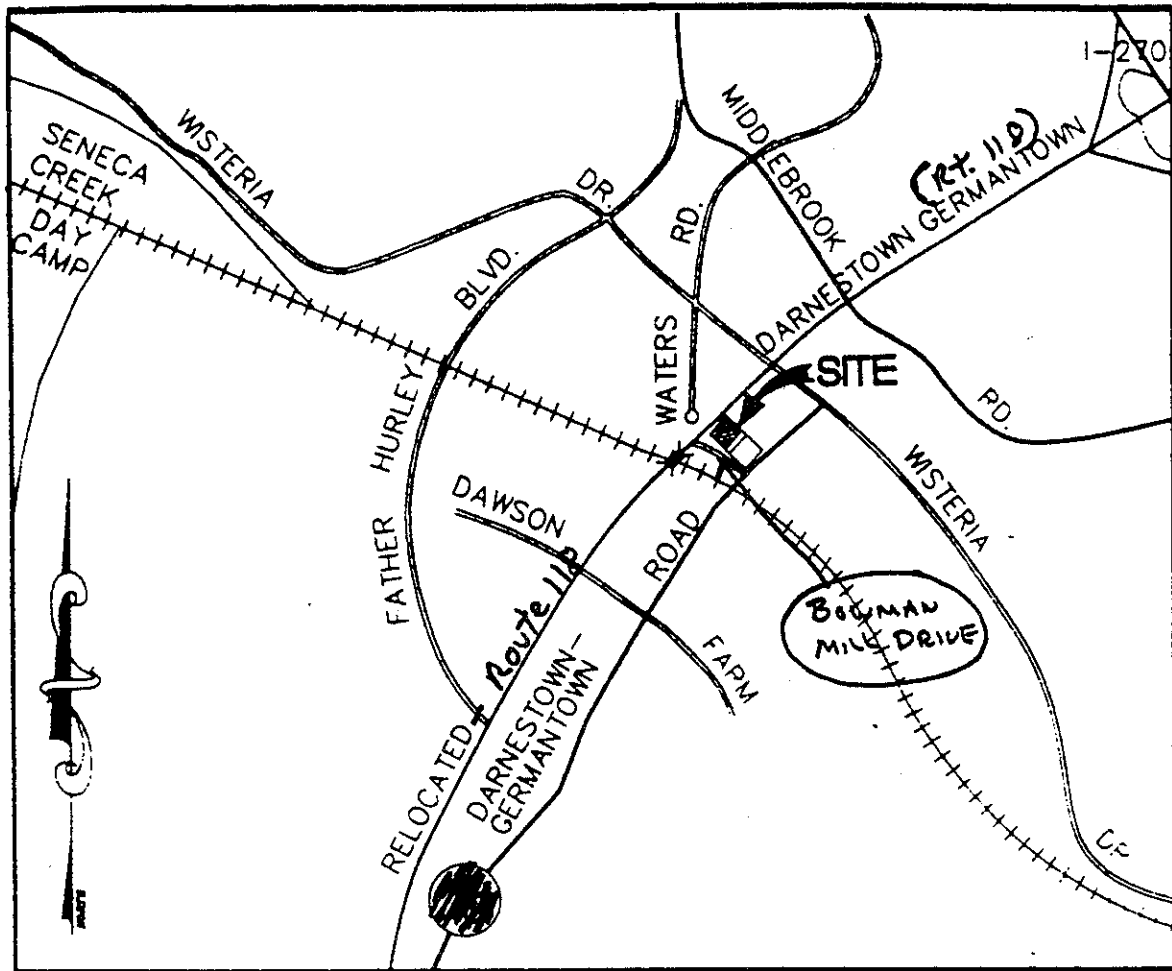
For the convenience of the reader, the findings of fact are grouped by subject matter. Where there are conflicts in the evidence, the conflicts are resolved by the preponderance of evidence test.

A. The Subject Property

The subject property is located in the Germantown and Vicinity Planning Area about a mile southwest of the I-270 interchange with MD Route 118, a six-lane divided highway that extends past the subject property and the Germantown Town Center. The subject property is located at the intersection of Bowman Mill Drive and Route 118, and contains about 257 feet of frontage along Route 118 and 249 feet of frontage along Bowman Mill Drive. The site forms a nearly square-shaped parcel and its location and shape are depicted on the next page.

The property is relatively level, but about halfway into its depth it drops in elevation about six to eight feet toward the dedicated right-of-way for an unbuilt portion of Walter Johnson Road. The property is heavily wooded except for its northwest corner and the trees extend 30 to 40 feet in height. The site does not contain any streams, wetlands, floodplains or other significant environmental features.

The subject property was created from two elongated adjacent lots that extended between Route 118 and Walter Johnson Road, which is old Route 118. These lots were owned by the Applicant and the Verizon Telephone Company (Verizon) and were subdivided and combined into two square-shaped lots. See Exs. 6, 46 and 47.



VICINITY MAP

B. Planning and Zoning History

The subject property was initially classified under the R-R (Rural-Residential) Zone by the 1958 countywide comprehensive zoning. Subsequently, the R-R classification was changed to the R-200 Zone, although the density remained the same. Comprehensive zonings in 1974, 1984 and 1987 confirmed the R-200 zoning for the subject property. On August 4, 1987, a portion of the subject property was reclassified to the O-M Zone under Local Map Amendment (LMA) G-509. The most recent comprehensive zoning in 1990 confirmed the existing split zoning designation of the site for the O-M and R-200 Zones.

As indicated, the property formed part of a larger 2.77-acre tract that was subdivided in August 2000 into two lots that are separated by the proposed extension of Walter Johnson Road. The second lot, which is not part of the instant application, is owned by Verizon and is also classified under the O-M and R-200 Zones. The Verizon lot is currently improved with a 6,900-square-foot telephone dial center under a special exception approved on October 27, 1970. The O-M portion of the Verizon lot is approved for a 3 story, 2,355-square-foot bank building, although this approval is subject to future modification as the Board of Appeals recently approved a special exception modification for a 23,000-square-foot expansion of the dial center on the R-200-zoned portion of the lot that included the O-M-zoned portion of the lot as reserved for off-street parking. Ex. 115 (a).

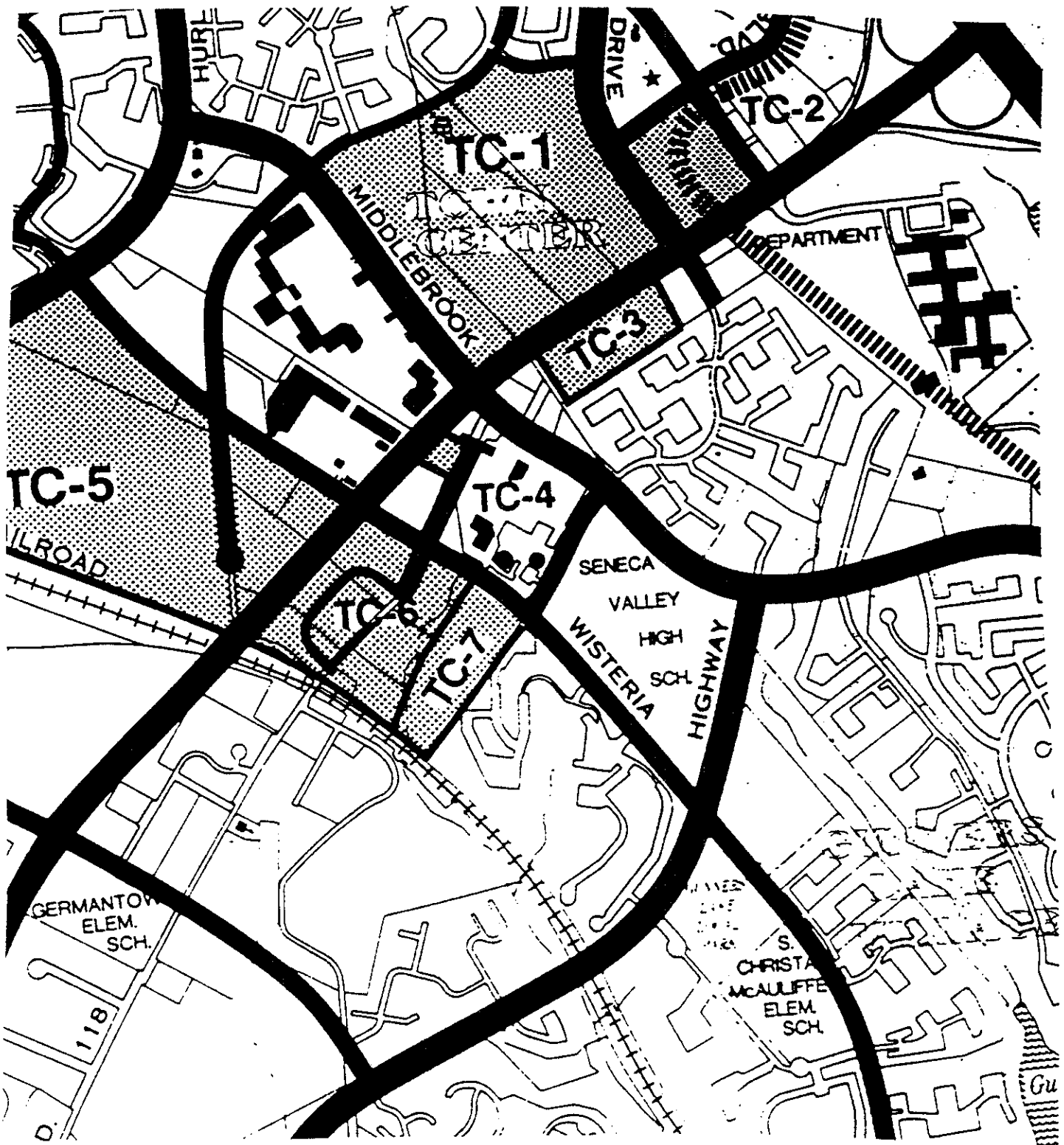
C. Master Plan and Historic Areas

The subject property is located within Analysis Area TC-6 of the *1989 Approved and Adopted Germantown and Vicinity Master Plan*, Ex. 121. The master plan describes this area as a transition between the Town Center core areas and the Germantown Historic District and Town Center Historic Area. Part of Analysis Area TC-6 is classified under the O-M Zone and the balance of the area is classified under the R-200 Zone. This zoning is in conformance with the recommendations of the master plan. The Analysis Area TC-6 is bounded by the CSX railroad right-of-way, Route 118, Wisteria Drive, and a stream and uses located on the southeast side of Walter Johnson Road. This area is depicted on the next page.

1. Character and Function of Analysis Area TC-6

Analysis Area TC-6 reflects a quiet, passive and pedestrian-oriented enclave that provides relief from more intensive development located in the Town Center core areas to the northeast. The master plan acknowledges this character and recommends medium office intensity under the O-M Zone.

Another element vital to Town Center development is the Town Center Historic Area. The Town Center Historic Area includes two historic resources: the Madeline V. Waters House...



and the Pumfrey/Mateney House.... This area is recommended to provide a passive and pastoral environment within an intensively developed Town Center, which can coexist and, in fact, flourish.

Adaptive reuse may be appropriate for the historic resources and the other existing structures in the Historic Area,

perhaps as craft and antique shops or even a restaurant. Since *this area is suitable for development with medium office intensity uses in the O-M zone*, appropriate development guidelines have been developed that foster the positive integration of old and new. [1989 *Germantown Master Plan*, Ex. 121, p. 33, emphasis supplied]

The master plan contains additional text that further addresses the character and function of Analysis Area TC-6:

Analysis Area TC-6 is the Town Center Historic Area and includes the properties fronting on existing MD 118 [now Walter Johnson Road], northeast of the railroad tracks. Included in this 23-acre area are the C&P Telephone Company [now Verizon] building and the expansion of the commuter train station parking area. The Pumphrey/Mateney house..., an historic resource in the Germantown Historic Area, is located in this area, near the railroad tracks. Two parcels and a portion of another are zoned O-M in conformance with the Service Commercial recommendation of the 1974 Master Plan; the balance of the area is zoned R-200.

The southern portion of the Madeline V. Waters House historic resource...is also located in this Analysis Area. A double row of evergreen trees remain on this site. The tree-lined entry drive to the historic house should be retained in the future development of this portion of the Analysis Area....

This Plan recommends that this Analysis Area be a quiet, green, pedestrian-oriented enclave that provides relief from the intense development of the Town Center. It should establish a strong visual and functional link to the Germantown Historic District directly across the railroad tracks. (See Analysis Area CL-1.) When Relocated MD 118 is open to traffic, the existing railroad bridge will be either closed to automobile traffic or replaced by a pedestrian bridge. This will serve to limit traffic and further enhance the passive environment. [id. at p. 42, emphasis supplied]

When Route 118 was relocated and opened to traffic, the existing bridge for old Route 118 that extends over the railroad tracks was closed to automobile traffic and was replaced by a pedestrian bridge in the fall of 2000. The right-of-way for old Route 118 is now Walter Johnson Road, which is located in Analysis Area TC-6, and Liberty Mill Road, which is located in the Historic District or Analysis Area CL-1.

The master plan goes on to address access, design and zoning issues for Analysis Area TC-6.

As shown on the Zoning and Highway Plan, this Analysis Area is recommended to be served by a one-way loop road branching off a divided arterial road. *The intent of this recommendation is to provide appropriate access while preserving existing trees and reducing the impact on two historic resources within the Germantown Historic District.*

* * *

This Plan recommends retaining the existing R-200 Zone as the base zone. This Area is appropriate for low-intensity office uses in order to retain and enhance the existing visual character of this area. This area could be appropriate for the O-M (Office Building-Moderate Intensity) Zone, but the following issues of compatibility need to be addressed:

- ° preservation of the existing single-family detached residential character; and
- ° retention of existing trees.

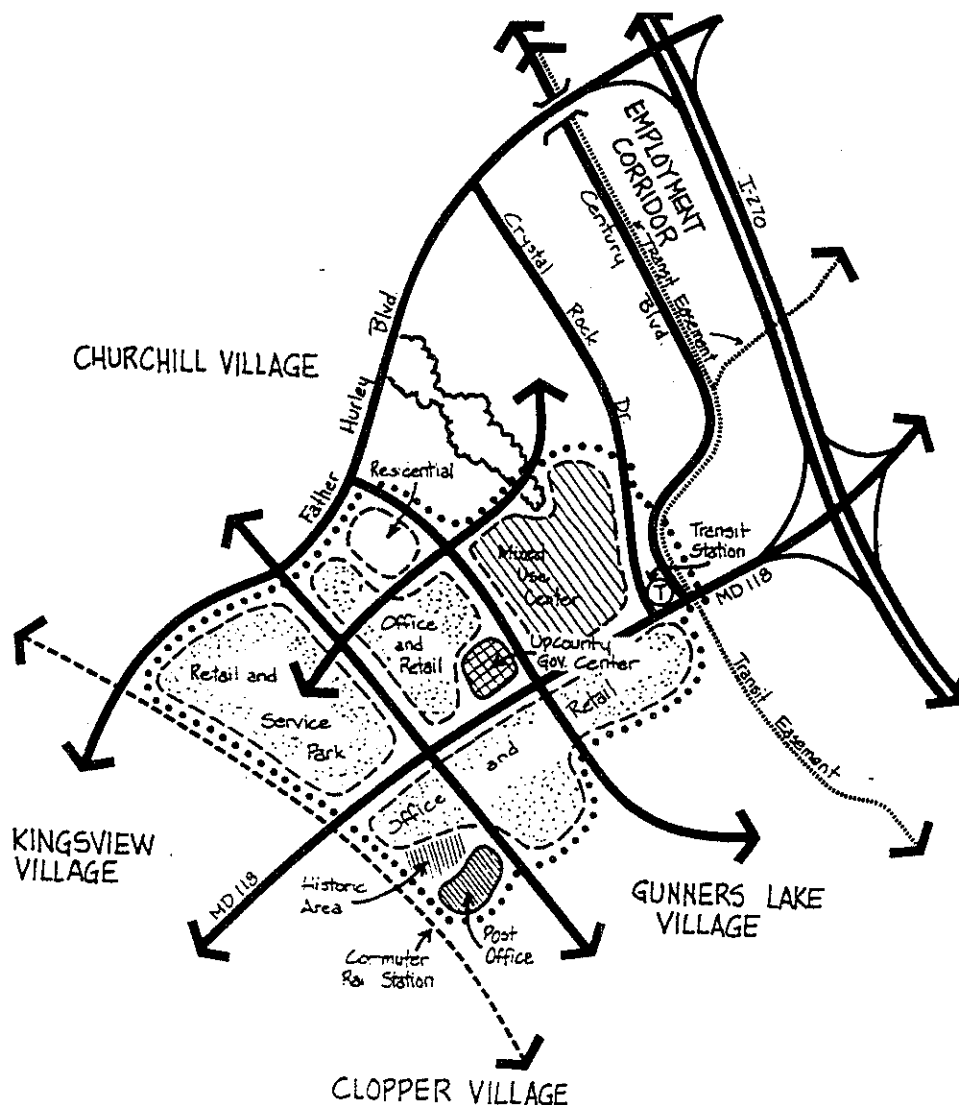
One avenue to address these compatibility issues would be a rezoning application for the O-M Zone using the optional method of application and a schematic development plan. Furthermore, special exception uses should not be approved if they conflict with the intent to achieve a passive pedestrian environment in this area.

If the C&P Telephone Company [now Verizon] property or the commuter rail station parking area cease being in public use, they would also be appropriate for low-intensity office uses under the O-M Zone. [1989 Germantown Master Plan, pp. 42-43, emphasis provided]

A master plan concept design, which shows the location of the Historic Areas and other future development in the town center areas, is depicted on the next page.

2. Construction of MARC Parking Lots

The master plan recommended the construction of MARC parking facilities to encourage use of commuter rail:



...The Germantown commuter rail station is located near existing Md 118 [now Walter Johnson Road], just west of the B&O Railroad tracks. Based on a survey in March 1986 by the Maryland Department of Transportation, approximately 150 passengers board the six trains at the Germantown station each weekday morning. A 138-space parking area is currently under construction.

* * *

This plan recommends that the parking facilities at the commuter rail station in Germantown be expanded. Montgomery County DOT has acquired two parcels on the east side of the railroad tracks. State DOT is preparing plans for the construction of a 250-space parking facility on these parcels. The development of this area will enhance the use of commuter rail service. [1989 Germantown Master Plan, Ex. 121, p. 128, emphasis supplied].

Following the approval and adoption of the master plan, Bowman Mill Drive was constructed as a convenient access point to connect Route 118 traffic to the MARC parking lots. Route 118 has become a major thoroughfare with a traffic volume of some 24,000 vehicles a day. Although the two MARC parking lots were initially planned for 388 spaces, one lot with 138 spaces and the other with 250 spaces, 535 total spaces were actually constructed with access by way of Bowman Mill Drive.

3. Link Between the Historic District and Analysis Area TC-6

As previously indicated, the master plan calls for a strong visual and functional link between Analysis Area TC-6 and the Historic District. It is clear that the master plan intends that any development within Analysis Area TC-6 be evaluated as to its impact on the nearby historic resources:

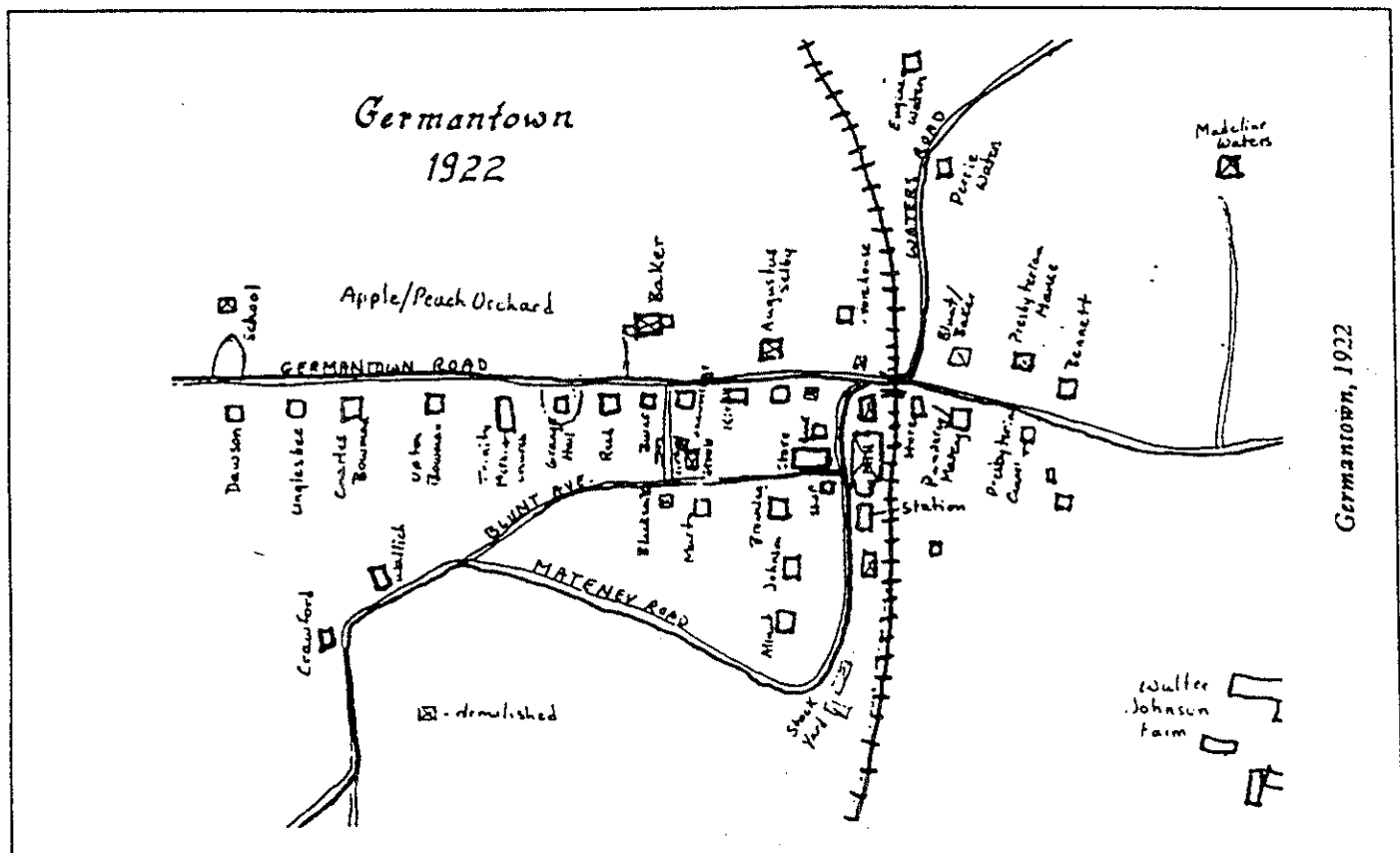
This master plan recommends that a streetscape be designed and implemented along existing MD 118 [now Walter Johnson Road], from proposed A-254 [Dawson Farm Road] to Wisteria Drive, to complement the streetscape proposed for Analysis Area TC-6.... In order to provide an inviting and pleasant area, this streetscape should include landscaping, lighting, pedestrian areas, and seating areas. The existing bridge over the B&O Railroad tracks will be retained as a pedestrian connection or replaced with a new pedestrian bridge. [1989 Germantown Master Plan, Ex. 121, p. 59]

* * *

This Plan recommends that special consideration be given to buffering the district so that there is a smooth, logical design progression between this historic enclave and the surrounding non-historic buildings and more intense uses. It is strongly recommended that any subdivision or site plan in the areas bordering on and adjacent to the Historic District be given careful consideration in terms of its impact on the Historic District. [1989 Germantown Master Plan, Ex. 121, p. 63, emphasis supplied]

The Historic District is located between 660 and 1,000 feet southeast of the subject property¹. It was originally settled as a rural railroad town where growth occurred on both sides of a railroad that was built in 1873. Old Route 118, which is now replaced by Liberty Mill Road and Walter Johnson Road, was the main street of the town and it crossed the railroad tracks at grade. The railroad was not a point of division but was a unifying factor in the town.

In 1890, a bridge was constructed over the railroad. This bridge was replaced by the current bridge in 1927. Since the town developed along both sides of the railroad, the people moved back and forth with regularity. On the northeast side of the railroad tracks the Pumphrey/Mateney House was built in 1890 as a store downstairs with a residence upstairs in a manner typical of the time. Next to it was the Presbyterian Chapel. A sketch of old Germantown as it existed in 1922 shows the longstanding link between the Historic District and Analysis Area TC-6. The sketch is depicted below.



¹ The Applicant's land planner, Philip Perrine, testified that the subject property is located 1,000 feet away from the Historic District. Another consultant for the Applicant, Kenneth Colbert, also estimated the distance to be about 1,000 to 1,200 feet. However, Mr. Colbert was requested to measure the distance from the subject property to the property line of Raymond Howar, a representative of the Opposition and a resident of the Historic District, and he found the distance was 660 feet, Tr. Oct. 23, 2001, p. 24.

The original historic district, as approved by the Historic Preservation Commission (HPC) and the Planning Board, included both sides of the railroad tracks particularly the Pumphrey/Mateney House and the Presbyterian Chapel, which is now the Lewis Veterinary office. When the County Council considered the proposed Historic District, it decided to choose representative buildings. Those residential and commercial buildings that were grouped close together were designated as the Historic District. The Pumphrey/Mateney House was designated as an individual historic resource outside the district but within Analysis Area TC-6, which was designated as a location for "Historic Areas".

Appendix L of the master plan provides specific detail about the Historic District and nearby Historic Areas and the need to protect them.

The...Germantown Historic District...is the one area in Germantown with an intact ensemble of historic resources that recall an overall historic ambiance. It is the heart of late 19th Century-early 20th Century Germantown and should be preserved as a important reminder of the area's history and identity. The collection of buildings – both commercial and residential – which remain in this proposed Historic District today are physical evidence of where, why and how Germantown originated.

The Germantown Historic District is important as it portrays a 19th Century rural railroad town. The 1873 opening of the Metropolitan Branch of the B&O Railroad was the primary factor for the shift of the Germantown settlement from the intersection of Germantown and Clopper Roads to the present location. Accessibility to the railroad enabled area farmers to more easily ship produce, grain, and milk to Washington. The milling and banking activities near the railroad added to the importance of Germantown as a center for economic activity.

Although several buildings have been lost through arson and neglect, there are enough intact historic structures remaining in the Germantown district to justify its designation. *In particular, ...the 19th Century Pumphrey House/Store...[is] ...noteworthy.* The collection of residential structures is also particularly outstanding, with strong uniformity of design and repetition of detail among the late 19th Century vernacular houses. These houses represent an important component of the Germantown settlement and typify the lifestyle of the townspeople. Each house with its associated

outbuildings represents a person who worked in and was a part of this early town....

* * *

It is recommended that any subdivision or site plan *in the areas bordering on and adjacent to the historic district be given careful consideration in terms of its impact on the historic district.* In addition, more detailed consideration of the buffering issue is needed, *and the development of a "buffer" zoning classification or overlay zone to provide the necessary design guidelines and review may be warranted the future.* [1989 Germantown Master Plan, Appendix L, Ex. 121, p. 233, emphasis supplied].

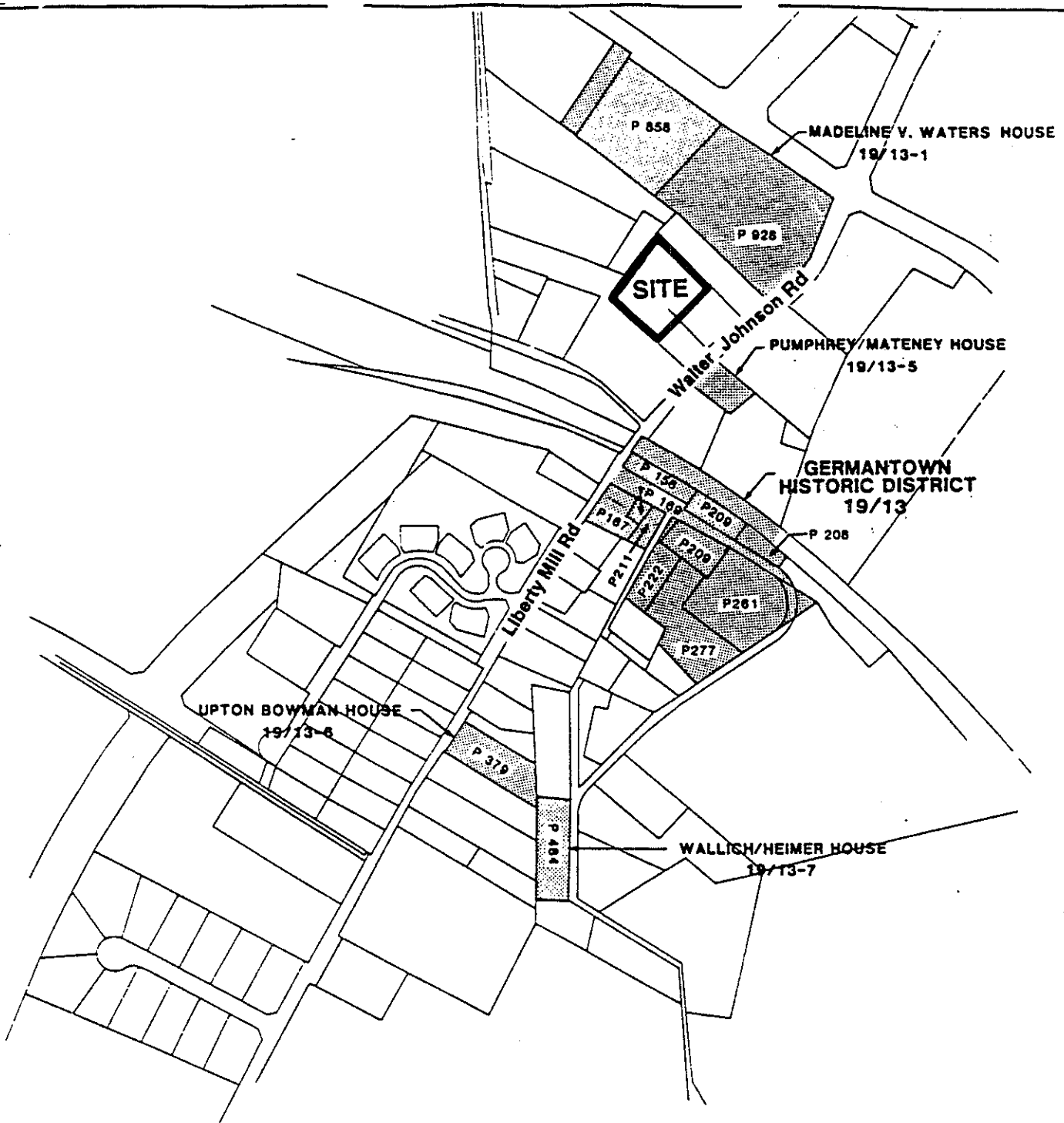
* * *

...Although the Waters House burned, several mature trees remain. All of these trees should be preserved and the site of the Waters House should be incorporated into the green space of any future development. This green space will provide a reminder of Germantown's history, a visual relief to the built and paved environment in the Town Center District and a quiet place for people to rest and relax.

The...Waters House is at a strategic location that, if handled carefully, *can be an important area of visual transition between the retail uses of the Town Center and the Germantown Historic District.* Historic designation does not preclude the development of the Waters House site, but it does provide an opportunity to guide that development in a way that will be an asset to the Historic Area and to Germantown as a whole....[id. at p. 42, emphasis supplied].

The quiet, passive and pedestrian environment of the area and its historic resources manifests the link between Analysis Area TC-6 and the Historic District. The historic Pumphrey/Mateney House is located at the end of Bowman Mill Drive and is directly across the railroad tracks from the Historic District. The Madeline V. Waters House was destroyed by fire but the property is still maintained as a historic site and it is located to the northeast of the subject property. Because of topography, the subject property is visible from parts of the Germantown Historic District.

The master plan identification of historic resources, the location of the site, and the relationship between the Historic District and the Historic Areas are depicted on the next page.



Germantown Historic District And Adjacent Historic Resources



Comprehensive Amendment
to the Master Plan for Germantown

Montgomery County, Maryland



The Maryland-National Capital Park and Planning Commission

D. Surrounding Area

The surrounding area in a floating zone case differs from a zoning neighborhood in a Euclidean zone case because of the differences between the two types of zoning. The zoning neighborhood is determined by the nature of the area and not the use. In a rural area, the zoning neighborhood tends to be large and in an urban area the neighborhood tends to be small. The purpose of the neighborhood is to evaluate changes since the last comprehensive zoning and not the impact of the proposed development. Compatibility is not an issue in a Euclidean zone case. The boundaries of the zoning neighborhood are more rigid than the surrounding area and are subject to precedent.

By contrast, a floating zone is more flexibly applied and the reason for evaluating the surrounding area is to assess the impact of the proposed use within an area. In some respects the surrounding area is like ripples created by a stone tossed into a quiet pond. The impact stops where the ripples end. The surrounding area is keyed to the use and can vary from case to case in the same area depending on the intensity of use. For this reason, surrounding areas that were applied in other cases do not have a high value as precedent unless there is a marked similarity in the facts and circumstances. In this case there is sharp disagreement over the relevant surrounding area and this conflict must be resolved before other facts are considered.

The Technical Staff defined the surrounding area as an area bounded on the northeast by a line 200 feet northeast of Wisteria Drive, on the east by a line about 200 feet east of Walter Johnson Road, on the south by a line 300 to 400 feet south of the CSX railroad right-of-way, and on the northwest by a line 200 feet northwest of MD Route 118. This is the same area applied by the District Council when it approved the O-M Zone for a portion of the subject property under LMA G-509 in 1987. This area was adopted before the master plan established its boundaries for the analysis areas.

The Applicant submitted an area bounded by the railroad tracks to the south, the automotive uses located on the northwest side of new Route 118, uses on the south side of Walter Johnson Road including the post office building, and Wisteria Drive on the northeast. See Ex. 43,

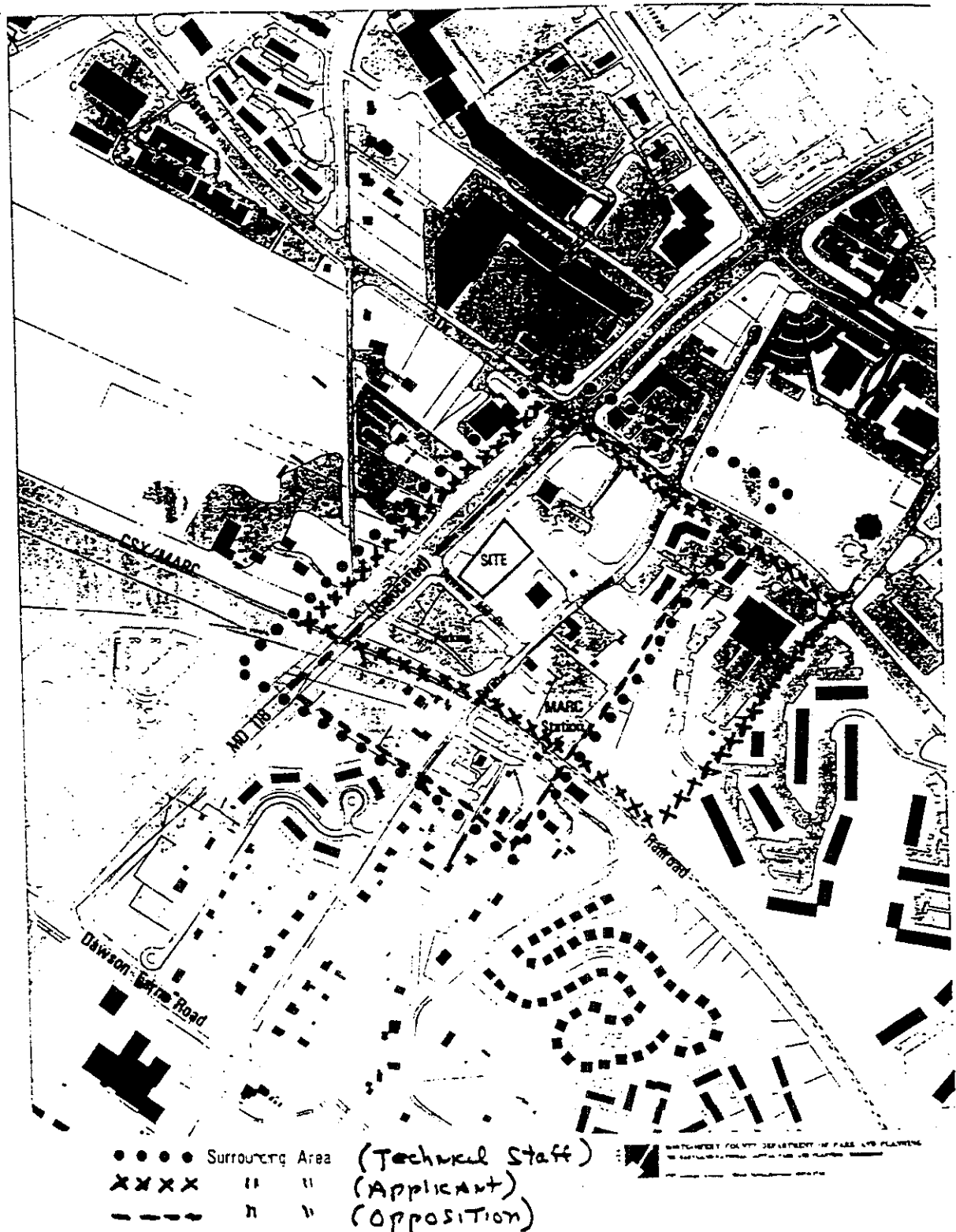
outlined in red. This area includes Analysis Areas TC-6 and TC-7 as well as uses on the north side of Route 118. The Applicant contends that this recommended area is consistent with the area used by the District Council in LMA G-595².

The Opposition submitted a third surrounding area bounded on the northwest by Route 118, on the northeast by Wisteria Drive, on the southeast by the regional stormwater management facility and on the south by the back ridge line of the Germantown Historic District. The opposition's area includes all of Analysis Area TC-6 and part of CL-1. The three recommended surrounding areas are illustrated on the next page.

The Technical Staff's recommended area is too large in several respects. It extends beyond Route 118 and Wisteria Drive, both of which are major roads that are logical dividing lines for the surrounding area. Moreover, these boundaries coincide with the master plan boundaries for Analysis Area TC-6. The Applicant's recommended area also extends beyond Route 118 to include automotive uses on the north side of the road. The impact of the proposed development into this extended area is questionable since none of the uses located on the northwest side of the road have direct access to Route 118. The Applicant contends that access to Route 118 might be gained through a future intersection at Bowman Mill Drive where there is a curb cut. There are no plans for such an intersection. The Applicant's contention is pure conjecture and does not form the basis for ignoring the logical and natural dividing line applied in the master plan.

The Applicant's recommended area does not extend far enough southwest as it stops at the railroad tracks and ignores the historic link between the Germantown Historic District and TC-6's Historic Areas. The Applicant's reliance on the surrounding area used in LMA G-595 is misplaced

² The surrounding area used in LMA G-595 in 1990 did not rely on Analysis Area TC-6 and instead relied on an area extending 600 feet from either side of old Route 118, now Walter Johnson Road, between the railroad tracks and Wisteria Drive. This area roughly coincides with the boundaries of Analysis Area TC-6.



because the zoning in that case was approved before Route 118 was relocated and vehicular and pedestrian traffic patterns of the area were subsequently changed. Other differences include the location of the properties and the intensity of uses proposed. The use proposed here would introduce a new retail use into an area designated for R-200 and O-M zoning and would locate this retail use very close to the

Historic District and Historic Areas. LMA G-595 involved a use that is consistent with the master plan and the ambiance of the area and is located further away from the Historic District. The Applicant's reliance on the southwestern boundary of Analysis Area TC-6 is also misplaced because the master plan makes clear that the Historic District and TC-6 and its Historic Areas are interrelated entities. The MARC parking lots are inherently part of the train station. Moreover, the conversion of the bridge over the railroad tracks to pedestrian use creates four pedestrian crossing points into the Historic District from Analysis Area TC-6. The surrounding area needs to extend into the Historic District to evaluate the impact of the proposed development on the interrelated pedestrian circulation systems and land uses.

The Opposition's surrounding area is consistent with the master plan's link between the Historic District and TC-6's Historic Areas. The Opposition's surrounding area also contains boundaries that represent reasonable limits of any impact from the proposed development. For these reasons, the Opposition's surrounding area will be adopted for the evaluation of this application.

E. Land Use and Zoning Pattern

The land use and zoning pattern reflects a variety of uses classified under office and residential zones. The uses within the Germantown Historic District are primarily historic single-family homes and a bank building. The District also includes the MARC commuter railroad station, which is a replica of the original station that burned down, and associated parking areas.

The uses within Analysis Area TC-6 include, in addition to the two aforementioned individual historic resources, the parking lots for the MARC station, the Verizon Telephone Dial Center, and several office uses. Since Analysis Area TC-6 functions as a transition area, the area also contains streetscape, trees and low-scale, ornamental, Washington-type streetlights. The office uses are largely developed with low intensity uses under restrictive SDPs under the O-M Zone or special exceptions under the R-200 Zone. These uses are consistent with the character of the area.

In order to maintain a connection of the separate historic resources, a bridge over the railroad was converted to a pedestrian use and it is designed to be compatible with the historic resources.

In order to maintain a connection among the separate historic resources, a bridge over the railroad was converted to pedestrian use and is designed to be compatible with the historic resources. It contains brick paving stones, ornamental Washington-type streetlights, old-fashioned benches that blend with a historic setting, and iron fencing. The bridge is a very popular amenity in the area and is heavily used by area residents and commuters. A small pedestrian park is located adjacent to the bridge, the Pumphrey/Mateney House and Bowman Mill Drive.

Bowman Mill Drive was constructed in a manner that provides a vehicular and pedestrian entranceway to the Historic District. It is a two-lane road that is flanked by pedestrian walkways, street trees and ornamental Washington-type streetlights. The Pumphrey/Mateney House is located at the end of Bowman Mill Drive, about 800 feet from the subject property, and is framed by the road and its streetscape to convey a visual perspective from Route 118 of the area's historic resources. Bowman Mill Drive has enhanced the pedestrian friendly environment of the area by providing both vehicular and pedestrian access to the historic resources of the area.

Located immediately adjacent to the subject property, across Bowman Mill Drive, is the 270-space MARC commuter parking lot. Another MARC parking lot is located at the end of Bowman Mill Drive. The parking lots are separated from the commuter rail station by the railroad tracks. The parking lots have very little vehicular activity on weekends when the area is devoted to community uses. There are some four pedestrian crossovers that connect Analysis Area TC-6 and the Historic District. Located adjacent to the subject property, across the dedicated but unbuilt Walter Johnson Road, is the Verizon Dial Center, which is presently contained in a 6,900-square-foot building 20 feet in height. This building has been approved for a 23,000-square-foot expansion under a special exception modification. *See Ex. 115.*

To the west of the subject property is an undeveloped O-M zoned parcel known as the Huie property, which is 100 feet in width as it extends from Route 118 to Walter Johnson Road. Further west is the Wisteria Business Park, which is the site of the Madeline Waters historic property. The

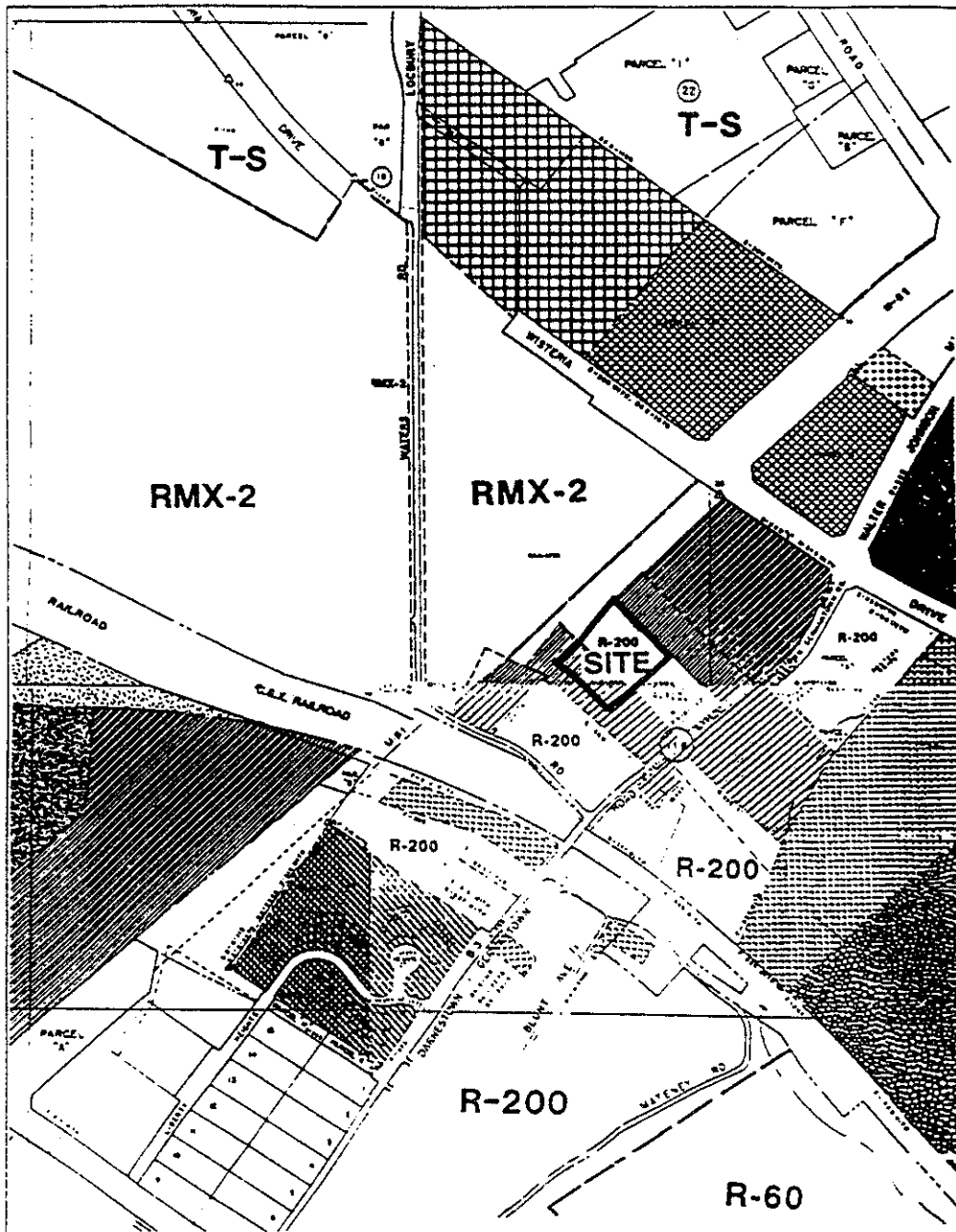
business park contains a copy center and is the proposed site for a 10,000-square-foot childcare center to be located at the intersection of Walter Johnson Road and Wisteria Drive. Located on the southeast side of Walter Johnson Road and Wisteria Drive is a 28,000-square-foot, two-story medical office building constructed in a townhouse configuration. On the southwest side of the medical offices is the Lewis property, developed with a 42,000-square-foot veterinary clinic, which includes the former Presbyterian Chapel, a part of old Germantown that the Germantown Historical Society plans to nominate as a Historic Site.

Existing office uses are developed with about 50,000 square feet. Ultimate build out would produce about 170,000 square feet, which includes the medical center townhouses, the Lewis property, the copy center, the planned childcare center, Verizon and the undeveloped Huie parcel next to the subject property. Parking currently makes up about 32% of the land area and includes both public and private parking areas. With future development, the parking may reach about 50% of the land area within Analysis Area TC-6. There is no C-3 zoning or other retail use within the surrounding area.

There is a sharp disagreement over the character of Analysis Area TC-6. The preponderance of evidence indicates that the area has largely developed as envisioned by the master plan and reflects a quiet, passive and pedestrian-oriented character. While the Applicant concedes that this character is prevalent along Walter Johnson Road, it contends that the introduction of Bowman Mill Drive changed the character around the vicinity of the subject property. This attempt to create a separate enclave within the surrounding area is unsupported by the facts. Bowman Mill Drive actually enhances the existing pedestrian character of the area with its walkways and streetscape. This character would change only if the proposed use were approved for this location. The zoning pattern of the vicinity is depicted on the next page.

F. Proposed Development

The Applicant proposes to limit development under the C-3 Zone by means of a SDP. The plan contains binding elements that include a 3,100-square-foot one-story building, a maximum



building coverage of 5.5% of the site, a minimum green area of 35% of the site, and several prohibited uses. Some 13,753 square feet of the site will be dedicated for the extension of Walter Johnson Road. The prohibited uses include storage of waste material, auto parts, refuse and “motor”³ within any required setback; automobile, truck, boat and trailer sales, service and rentals; building supply stores; eating and drinking establishments including drive-ins; heavy equipment sales and service; and billiard

³ The term “motor” is vague and has little meaning with respect to the list of prohibitions. The record suggests that motor vehicles may have been intended here and the omission of the word “vehicle” may be a typographical error. Nevertheless, it must be corrected if the SDP is to be approved.

parlors, bowling alleys, miniature "goldlf"⁴ courses, or roller rinks. Proposed signage must comply with the county code, and no major motor vehicle repair operations may be conducted on-site.

It is the Applicant's intention to develop the property with an automobile filling station with twelve pumps, a canopy cover and a convenience store as an accessory use. The accessory use would occupy about 1,850 square feet of the proposed building as retail space and the balance of the building would be used for bathrooms, office space and storage. The automobile filling station use would require a special exception from the Board of Appeals and, therefore, is not a binding element of the SDP. It is shown on the plan as an illustrative use. The plan also shows 25 parking spaces as an illustrative use.

The architectural features of the proposed building reflect brick treatment and a soft appearance. The Applicant intends to use design concepts of the new urbanism that call for architecture on all four sides of the building, window treatment, a monument sign, and walkways to encourage pedestrian use. The architectural features are illustrative and are not binding elements of the proposal. The proposed building would have access from Bowman Mill Drive and the future extension of Walter Johnson Road. These two points of access would be the only access points and would provide for access to parking and the uses that are eventually authorized for the site. At this time the lighting plan envisions a design that will prevent light from shining off the premises. The light poles will be about 20 feet high including a three-foot base. There may be up to ten light poles depending on the final site design. Lighting will be subject to the approval of the Planning Board during the site plan review process. A monument sign would be placed on a three-foot base and contain a 25-square-foot illuminated sign. The building will be screened from nearby uses.

The SDP was amended several times during the course of the hearing with the last amendment submitted as Ex. 103. The SDP must be accompanied by a declaration of covenants, a document that is recorded in the event the SDP and zoning request are approved. The Applicant

⁴ This misspelled word appears to refer to "golf" courses. It must be corrected if the SDP is to be approved.

SITE DATA:

[illegible]

RELOCATED GERMANTOWN ROAD (MD. RTE 118)
(VARIABLE R/T)

BOYMAN WALL DRIVE

WALTER JOHNSON ROAD
(PUBLIC)

GENERAL NOTES

GEOTECHNICAL INFORMATION OBTAINED ON A FIELD SURVEY PERFORMED BY COLLEGE HILL
 CONSULTING, INC., DATED APRIL 1988.
 SUBJECT: FIELD SURVEY OF THE FOUNDATION OF THE HUNTSVILLE COURT
 BUILDING AT HUNTSVILLE, MISSISSIPPI.
 THE HUNTSVILLE FIELD NO. IS 001.
 HUNTSVILLE FIELD NO. 001, HUNTSVILLE, MISSISSIPPI, IS BEING THE
 ONLY SOURCE OF THE INFORMATION.
 INFORMATION CONTAINED HEREIN IS PREPARED BY A PERSONAL FIELD
 SURVEY OF THE HUNTSVILLE COURT BUILDING AT HUNTSVILLE, MISSISSIPPI.
 A SPECIAL DESCRIPTION TO RECORD AN OBSERVATION OF THE FOUNDATION OF THE
 BUILDING IS BEING MADE IN SECTION 10-1-1 (1) AND 10-1-1 (2) OF THE
 HUNTSVILLE COURT BUILDING.
 THERE ARE NO OTHER INFORMATION ON THE FOUNDATION OF THE BUILDING.
 INFORMATION IS NOT BEING USED AS A SOURCE OF THE HUNTSVILLE COURT BUILDING.

SCHEMATIC DEVELOPMENT PLAN
AUTOMOBILE FUEL SALES W/
CONVENIENCE STORE
RELOCATED GERMANTOWN ROAD (S.D. RTE. 180)
AND BOHMAN MILL DRIVE

പ്രസ്താവന

Calbert Mott Research, Inc.

Eugene • Eugene • Eugene
 2222 North Main, Eugene •
 Eugene, Oregon 97403
 Eugene (503) 253-1111
 Eugene (503) 253-1111

[illegible]

LAND USE SUMMARY

[illegible]

USE ELEMENTS SHOWN THUSLY * ARE BINDING.

ALL OF THE ABOVE BINDING ELEMENTS ARE SUBJECT TO FINAL SITE PLAN APPROVAL BY THE MONTGOMERY COUNTY PLANNING BOARD AND SPECIAL EXCEPTA APPROVAL BY THE MONTGOMERY COUNTY BOARD OF APPEALS.

- BUILDINGS, STRUCTURES, PARKING ACCESS, LOCATIONS, SETBACKS AND USE ARE LIMITED ONLY, AND WILL BE ESTABLISHED AT TIME OF SPECIAL EXCEPTION APPROVAL BY THE MONTGOMERY COUNTY BOARD OF APPEALS AND/OR AT THE TIME OF SITE PLAN APPROVAL BY THE MONTGOMERY COUNTY PLANNING BOARD.

G. Public Facilities

Evidence on public facilities included water and sewer, stormwater management and traffic. All but traffic is uncontested.

1. Water, Sewer and Stormwater

The evidence indicates that the proposed development is served by public water and sewer facilities and other public services. The site is classified in water service category, W-3, and sewer service category, S-3. A water line abuts the property and no extension lines would be required to provide service. A sewer line also abuts the property and program-sized mains would not be required. Interceptor capacity is deemed adequate and the proposed zoning will not significantly impact either the water or sewer systems. Local service is deemed adequate.

An existing regional stormwater management facility is located southeast of the MARC parking lot and this facility will be used to handle water quantity through underground pipes from the site. The site will contain a water quality facility. A stormwater concept plan was approved by the County's Department of Public Works and Transportation. The Technical Staff indicated that forest conservation requirements are satisfied, Ex. 56.

2. Traffic and Traffic Safety

The evidence shows that the proposed use is the most intensive use in terms of total trips permitted and feasible under the C-3 Zone.⁵ The traffic evidence reveals conflicts over the scope of the Applicant's traffic study, use of background traffic, evaluation of capacity and safety issues at Bowman Mill Drive, and necessary mitigation for congested intersections. These issues are examined below.

⁵ In a floating zone case the most intensive use is evaluated to measure compliance with the standards of the C-3 Zone unless the use is restricted by the SDP. See, *Wheaton Moose Lodge v. Montgomery Co.*, 41 Md. App. 401, 397 A.2d 250 (1979). The Opposition's contention that the impact of a car wash and more gasoline pumps should be considered was adequately rebutted by the Applicant's evidence that these additional use are not feasible under the SDP.

(a) Scope of the Traffic Study

The area road network is anchored by Route 118, a major highway with six lanes within a master planned right-of-way of 150 feet. Route 118 has a median break at its intersection with Bowman Mill Drive. This highway provides direct access to I-270 to the northeast. The State Highway Administration will not provide direct access to the site from Route 118 even though the site has extensive frontage along that road. Located southeast of the site is Walter Johnson Road, which functioned as old Route 118 before the new, realigned Route 118 was constructed. Located immediately adjacent to the site is Bowman Mill Drive, which was constructed as a two lane road under business street standards as part of the access road for the MARC parking lots. Access to the site is by way of Bowman Mill Drive, which connects to Route 118 to the northwest and the future extension of Walter Johnson Drive to the southeast. The extension to Walter Johnson Drive is planned as a one-way loop road.

In this case the Technical Staff recommended the evaluation of four intersections. These intersections include Route 118 at Wisteria Drive and Middlebrook Road, which are both signalized intersections. The third intersection is Wisteria Drive at Walter Johnson Road. The fourth intersection is Route 118 at Bowman Mill Drive. The Applicant submitted a traffic analysis of the likely impact of the proposed development on these intersections. The analysis assumed the use of a convenience store and automobile filling station. Traffic counts were made at the intersections. The Critical Lane Volume (CLV) standard for this area of the County is 1,500. All the intersections were found to operate within this level of service standard under existing conditions.

The Opposition contends that the traffic study should have included more intersections along Route 118 including Dawson Farm Road, Aircraft Drive and Crystal Rock Drive. The Applicant countered that the size of the proposed development should dictate the scope of the traffic evaluation. The Technical Staff normally limits small projects to one or two intersections. The Opposition's evidence is not persuasive as to why the scope of traffic study should be enlarged in such a

comprehensive manner for a small-scale project. Only one of the intersections identified by the Opposition seems to be relevant here.

The Applicant did not include the next intersection to the southwest, Dawson Farm Road, which is only 600 feet from the subject property. The Applicant neglected to provide evidence about the signalization of this intersection or identify the next signalized intersection to the southeast. The importance of this omission relates to the fact that Bowman Mill Drive is not signalized and traffic exiting from that road must rely on gaps in traffic along Route 118. The Applicant provided evidence that sufficient gaps exist to the northwest because of the signalization at the intersection of Wisteria Drive and Route 118. However, there is no evidence about gaps in the other direction, which will also affect turning movements from Bowman Mill Drive. Consequently, the scope of the traffic evaluation should have included at least one signalized intersection to the southwest.

(b) Use of Background Traffic

The Technical Staff identified the area of background traffic. This factor accounts for projected trips from approved but as yet unbuilt development. The Opposition provided extensive testimony about the failure of more background traffic in the analysis. The Germantown West Policy Area contains some 12 traffic analysis zones (TAZs) but only four TAZs were selected for the analysis of the intersection of Route 118 and Middlebrook Road, that is, zones 252, 282, 283 and 284. In a traffic analysis for the Bellemead Development Corporation, dated February 2000, Ex. 93 (b), the developer there was also required to evaluate the same intersection, but the Technical Staff applied eight TAZs for background traffic projections instead of the four applied here. The Opposition contends that if just one of these additional zones were applied to the facts of this case, traffic conditions along the Route 118 corridor would reflect much more congested conditions than projected by the Applicant's study. The Opposition contention is unpersuasive.

The Bellemead development, approved under LMA G-742, for the Town Center core area involved substantial mixed-use density on a 24-acre parcel. The Bellemead development is substantially larger in size and impact than the proposed development. Each case must be evaluated on its own facts and circumstances and the selection of background traffic involves the professional judgment of the Technical Staff. Given the size of the proposed development there is no basis to second-guess the staff's professional judgment on background traffic.

(c) Capacity and Safety Issues at Bowman Mill Drive

The intersection at Bowman Mill Road and Route 118 provides the main access to the subject property. A master planned loop road will provide additional access to the subject property when the area is built out. The Applicant contends that these two roads will provide potential service road access, although the Applicant also contends that the proposed use would have little if any impact along Walter Johnson Road as most of the traffic impact from the site will take place at the intersection of Bowman Mill Drive and Route 118.

The Applicant's rebuttal evidence includes recent traffic counts of existing traffic at Bowman Mill Drive and Route 118 on September 5, 2001 during the morning and evening peak hours, that is, between 7:00 and 9:00 a.m. and between 4:00 and 6:00 p.m. The intersection operates at level of service A during both peak hour periods. There were 90 existing turning movements exiting Bowman Mill Drive, 14 in the a.m. and 76 in the p.m. The a.m. involved five right turns onto Route 118 and 9 left turns; the p.m. involved 18 left turns and 58 right turns. There were 137 existing turning movements entering Bowman Mill Drive, 108 in the a.m. and 25 in the p.m. The a.m. involved 75 left turns from Route 118 and 33 right turns from Route 118. The p.m. involved 15 left turns from Route 118 and 10 right turns. See Ex. 101 (a) and (b).

The proposed development is projected to have a fairly high driveway volume entering and exiting the site. Tr. Sept. 11, 2001, p. 105. The traffic generated by the proposed development

during the a.m. peak hour is projected to include 74 total trips into the site and 74 out of the site. This traffic volume reflects 19 diverted trips, 44 pass-by trips, and only 11 new trips on the road network. The site-generated traffic for the p.m. peak hour is projected to include 131 trips in and out of the site, which is composed of 46 diverted trips, 66 pass-by and only 19 new trips. See Ex. 21 (a), p. 10, Table 3 and pp. 12 and 14, figures 8 and 9.

Diverted trips are already on the road network but must make a diversion to access Route 118. Pass-by trips are also on the road network, but are on Route 118 and "pass by" the proposed use. Since the diverted and pass-by trips are already on the road, the proposed use will not generate as much new traffic as an office use and the Applicant used a 15% adjustment factor as authorized by the 1998 *Local Area Transportation Review Guidelines*, Ex. 85.

The Applicant contends that traffic movements can be made to and from Bowman Mill Drive in a safe manner because of the levels of service and the gaps in traffic along Route 118 caused by the traffic signal at the intersection of Wisteria Drive and Route 118, which is located about 1,100 feet from Bowman Mill Drive. However, as indicated, the Applicant neglected to show any gaps in the other direction. The failure to include evidence of traffic gaps from the southwest means there is little factual basis for a conclusion that the access at this intersection will be safe, adequate and efficient.

The Applicant also contended in its case in chief that sight distance at the intersection was safe and adequate. This conclusion was completely without foundation as there was an absence of distance and speed measurements. On rebuttal the Applicant submitted evidence that sight distance at the Bowman Mill Drive intersection with Route 118 is 811 feet to the southwest and 770 feet to the northeast. The Applicant contends that these distances are acceptable to accommodate design speeds of 70 mph although backup data on this conclusion was not provided. The existing speeds along Route 118 were measured at 57.2 mph or lower at the 85 percentile level, which means that only 15 percent of the traffic reflects higher speeds and no one was detected above 60 mph. The posted speed limit along this area of Route 118 is 50 mph.

The testimony relating to the traffic count and other evaluations of the intersection was admitted over the strenuous objections of the Opposition, who contended that the testimony should have been part of a written report that was provided before the testimony was given. The Applicant did submit some written materials in support of the testimony as it was given. Notably absent from the Applicant's testimony was any information about the MARC train schedule and the relationship between the arrival of trains and commuter traffic⁶. The traffic to and from the MARC parking lots is keyed to the arrival and departure of the trains and these times constitute the true peak times for this intersection. The Applicant's peak traffic evidence should have coincided with the train schedule and measured the traffic at the intersection during these times.

The Applicant's evidence about both capacity and safety issues for this intersection was inadequate. The impact on existing traffic at this location is critical because the proposed development will rely almost exclusively on Bowman Mill Drive for its access to the site. The Applicant's traffic evidence should have carefully evaluated vehicular turning movements to and from Bowman Mill Drive for both MARC commuter traffic and site-generated traffic during the times of train arrivals and departures. While there may be some overlap between the Applicant's evidence and the Opposition's anecdotal testimony about the train schedule, there remain significant gaps as to what constitutes the peak commuter traffic and the impact of the proposed development on this traffic. Safe egress to Route 118 cannot be determined without an evaluation of the traffic gaps to the southwest. The Applicant neglected to provide adequate evidence to show that traffic generated by the proposed development can access the site by way of Bowman Mill Drive in a safe, adequate and efficient manner without adverse impact on existing traffic that uses the road for access to the MARC commuter parking lots.

⁶ The Opposition submitted some anecdotal testimony that train arrival may begin about 5:45 a.m. and continue at different points during the day until 7:00 p.m. The Opposition presented persuasive testimony that the peak traffic at this intersection was keyed to the arrival and departure of commuter trains.

(d) Necessary Mitigation

When background traffic was considered, two of the intersections, Route 118 and Wisteria Drive and Route 118 and Middlebrook Road, were projected to exceed the 1,500 CLV standard during either morning or evening peak hours or both. For example, Wisteria Drive was projected to have a CLV of 1,758 in the evening peak hour and Middlebrook Road was projected to have a morning peak CLV of 1,517 and an evening peak CLV of 1,980. When the trips likely to be generated by the proposed development were added, the projected traffic was found to exceed the CLV standards by even a greater amount. Wisteria Drive was projected to have an evening peak CLV of 1,783 and Middlebrook Road was projected to have a morning peak CLV of 1,518 and an evening peak CLV of 2,007. See Ex. 21 (a), Table 3.

The adverse impact of the proposed development on the road network can be mitigated by several improvements to the two intersections in question. For example, projected traffic conditions at the Middlebrook Road intersection can be improved by installing concurrent signal phasing and the construction of a southbound-to-westbound right hand turn lane. Projected traffic conditions at Wisteria Drive can be improved by changing the exclusive westbound-to-northbound right turn lane to a through and right turn lane. Both improvements would reduce the CLV to levels below background traffic conditions, which is considered to be acceptable traffic mitigation under adequate public facility standards. With the mitigation, the proposed development would not have any adverse impact on the road network or the surrounding area.

The proposed mitigation is not provided for in any publicly funded capital improvement program or any other proposed commitment. Tr., July 24, 2001, p. 94. Consequently, the Applicant failed to provide a commitment that is normally required at the zoning stage to show that the adverse impact caused by the proposed development will be adequately mitigated by improvements reasonably probable of fruition in the foreseeable future. *Montgomery County v. Greater Colesville Citizens*

Association, Inc., 70 Md. App. 374, 521 A.2d 770 (1987). The Applicant claims that mitigation will be addressed at the subdivision stage, but this remedy is uncertain since the property has already been subdivided and the Applicant may escape post-zoning traffic review. There is a need for a binding commitment as part of the SDP that would stage the proposed development until such time as mitigation is provided. The Applicant failed to furnish the required commitment.

In summary, the Applicant failed to meet its burden of proof to show the absence of adverse traffic impact by the proposed development.

IV. SUMMARY OF TESTIMONY

The testimony is presented to include the applicant's case in chief, the public agency comments, the opposition's case in chief, and the applicant's rebuttal.

A. Applicant's Case in Chief

1. Philip E. Perrine, qualified as an expert witness in the field of land planning.

Mr. Perrine described the creation of the subject property from two elongated adjacent lots that extended between new Route 118 and old Route 118. These lots were owned by the Applicant and Verizon and were subdivided and combined into two square-shaped lots. *See* Exs. 6, 46 and 47. The property contains about 257 feet of frontage along Route 118 and 249 feet of frontage along Bowman Mill Drive. The property is relatively level, but about halfway into its depth it drops in elevation about six to eight feet toward the dedicated right-of-way for the extension of Walter Johnson Road. The property is heavily wooded except for its northwest corner and the trees extend 30 to 40 feet in height.

Mr. Perrine concluded that the appropriate surrounding area for the analysis of the proposal is bounded by the railroad tracks on the south, the automotive uses located on the north side of new Route 118, uses on the south side of Walter Johnson Drive including the post office building, and Wisteria Drive. *See* Ex. 43, outlined in red. This includes Analysis Areas TC-6 and TC-7. He based

his area on the most recent zoning case adopted after the approval of the master plan, that is, LMA G-595, which approved the O-M Zone for a veterinary clinic along the south side of Walter Johnson Drive.

Mr. Perrine acknowledged that an earlier request for the O-M Zone for part of the subject property used a smaller area, but it was approved in 1987 prior to the adoption of the 1989 master plan. See LMA G-509. He disagreed with the Technical Staff's recommended surrounding area, which extended into the Historic District. He stated that there is no basis to extend the surrounding area beyond the railroad tracks because that is the natural and logical demarcation between neighborhoods and was followed by the master plan when it established the railroad as the boundary for TC-6. There is a substantial distance between the site and the Historic District and, combined with the barriers created by the railroad and topography, these factors support not extending the surrounding area into the Historic District.

Mr. Perrine described the land use and zoning pattern within the surrounding area. Located immediately adjacent to the subject property, across Bowman Mill Drive, is the 270-space MARC commuter parking lot. The commuter rail station is located across the railroad tracks and is about 1,000 feet from the subject property. On the north side of Route 118 are automotive-related uses that are clearly visible from the subject property and include an automotive repair facility, self-storage buildings and a U-Haul facility. Adjacent to the subject property is an undeveloped O-M zoned parcel, known as the Huie property, which is 100 feet in width as it extends from Route 118 to Walter Johnson Road. It is located between the subject property and the Wisteria Business Park, which contains the existing copy center and is proposed for development of office space and a 10,000-square-foot childcare center located at the intersection of Walter Johnson Road and Wisteria Drive.

Mr. Perrine indicated that there is a 28,000-square-foot, two-story medical office building constructed in a townhouse configuration and located on the southeast side of Walter Johnson Drive and Wisteria Drive. Located adjacent to the subject property across the dedicated but unbuilt Walter Johnson Road is the Verizon Dial Center that is presently contained in a 6,900-square-foot building, but

is planned for an expansion of 23,000 square feet under an approved special exception modification. To the south of Walter Johnson Road is an existing 42,000-square-foot veterinary clinic. An overlay to an aerial photograph shows the proposed development for the area as a whole, which will provide for over 100,000 square feet of office space and about 300 to 400 jobs. See Ex. 49 (a).

Mr. Perrine concluded that the area is not residential in character. Existing and planned office uses and parking will dominate the area. For example, an analysis of the existing 23-acre Analysis Area TC-6 shows that parking makes up about 32% of the land area and includes public and private parking areas. With future development, the parking will likely reach about 50% of the land area. The parking for the commuter rail station consumes about 4.3 acres or about 59% of all the off-street parking in the area.

Mr. Perrine testified that the master plan has an objective to provide for a quiet, pedestrian enclave and this has largely been achieved along Walter Johnson Drive or old Route 118 as development there has been limited to a pedestrian scale. However, he contended that the new intersection at Bowman Mill Road and relocated Route 118 created a different character than the rest of the enclave. The master plan loop road will function as a service road to provide a secondary access to the subject property, whereas the master plan only assumed one point of access by way of the loop road. He submitted photographs that show the subject property and its relationship to the automotive uses to the north and the commuter parking area to the west, Ex. 52. He indicated that C-3 zoning already exists along Route 118 just past Wisteria Drive. He conceded that there is no C-3 zoned property within his recommended surrounding area.

Mr. Perrine concluded that the proposed development would have no adverse impact on the Germantown Historic District or nearby historic resources. He testified that the subject property is located about 1,000 feet from the Germantown Historic District, which is located south of the railroad tracks and in another analysis area, Clopper Village. There is limited visibility from the Historic District to the subject property because intervening uses and trees screen the impact of the proposed

development. On cross-examination, he conceded that Analysis Area TC-6 borders on the Historic District and the master plan calls for careful consideration of the Historic District within this buffer area. He also indicated that there are two historic resources located in Analysis Area TC-6, the Madeline Waters property and the Pumphrey/Matenay House, which are both screened from the subject property by trees and buildings. In fact, the Waters property is located closer to existing C-3 zoned property across Wisteria Drive than it is to the subject property.

Mr. Perrine concluded that the proposed development would be compatible with the surrounding area. In terms of bulk, density and land use, the proposed use will be compatible with all nearby existing and planned uses. The building will be lower in scale and height than existing two and three-story offices and the Verizon building next to it. The floor area ratio (FAR) will be lower, at an FAR of 0.25, than the prevalent FAR of 0.3 to 0.42. Indeed, the maximum potential density under the O-M Zone is an FAR of 1.5. The C-3 Zone is a commercial zone like the O-M Zone and authorizes some of the same land uses. Offices tend to generate a lot of new vehicular traffic, while the proposed use will intercept existing traffic, thereby creating less activity than offices. The proposed use will generate more pedestrians than automobile traffic. Service stations and convenience stores have been developed in other areas of the County in a compatible manner. *See Ex. 69 (a-d).*

Mr. Perrine concluded that the proposed use would not have an adverse impact on adjacent uses. When the full build-out of Analysis Area TC-6 occurs, the proposed convenience store will provide a place for people to walk for lunch or buy convenience goods. There is nothing inherently incompatible with the uses proposed under the C-3 Zone and office buildings developed under the O-M Zone. He indicated that a fast food restaurant would be the worst-case use under the C-3 Zone and provided a comparison between the fast food use and an illustrative three-story office building of 25,000 square feet on the site. *See Ex. 84 (a) and (b).* He conceded on cross-examination that a convenience store could be as large as 20,000 square feet, but he argued that most convenience stores are only in the range of 1,500 to 2,500 square feet.

Mr. Perrine also concluded that the proposed development satisfies the purpose clause of the C-3 Zone. The subject property is adjacent to a heavily traveled highway of six lanes. The proposed use would be free standing and would not depend on adjacent uses for comparison-shopping or pedestrian trade. The use would intercept existing traffic and would provide services for travelers and highway users. Access to the site would be by way of two service drives, Bowman Mill Road and Walter Johnson Road, and this access would minimize interference with through traffic along relocated Route 118.

Mr. Perrine also concluded that the proposed development, while not in strict accord with the zoning recommendation of the master plan, is in general harmony with the objectives of the master plan. The 1989 master plan divides the Germantown area into six different villages and several Town Center areas. The subject property is located within Analysis Area TC-6, which is envisioned as a low-density office service area. The plan recommends the O-M Zone for this area using the optional method of application. The plan's intent is to create a quiet, green, pedestrian oriented enclave. However, the O-M Zone is not the only way to achieve a quiet pedestrian enclave. With the restrictions of the SDP, the proposed use will provide 35% green space and a low scale building along the lines of other development in the area. In fact, the proposed development will provide for more green area and a lower scale form of development than available under the O-M Zone. For example, the current Verizon Dial Center is about twice as big as the proposed building and will be expanded from its current size to a 30,000-square-foot building with 40 feet of height.

Mr. Perrine explained that significant changes have occurred following the adoption of the master plan that make the proposed use more consistent with the overall planning objectives for the area. A major change was the construction of Bowman Mill Drive at its intersection with Route 118. This will become a major intersection when planned development is completed and old Waters Road is realigned through an RMX-zoned parcel to the north. He conceded on cross-examination that the extension of old Waters Road to Route 118 is not currently planned, although Route 118 contains a curb

cut at the location where the intersection would be located. He conceded that the current road to the north ends in a cul-de-sac and there is a guardrail where the curb cut is located. The auto-related uses located on the north side of Route 118 are located outside of Analysis Area TC-6. He concluded that the construction of Bowman Mill Drive changed the character of the subject property and created new access to the area that was not contemplated by the master plan. The subject property is now a corner lot and has uniqueness not enjoyed by other properties in the area, especially those located along Walter Johnson Road. The proposed use would complement the office uses in the immediate area.

Mr. Perrine indicated that other changes include the proposed expansion of the Verizon Dial Center, the recent construction of the pedestrian bridge along the right-of-way of old Route 118, the approval of office zoning for the Lewis property, the development of substantial parking on three sides of the Pumphrey/Mateney House, and location of the 270 parking spaces in the MARC commuter lot. He conceded on cross-examination that all the changes except for the construction of Bowman Mill Drive were contemplated by the master plan. Mr. Perrine stated that while the vision of the master plan has been largely implemented, the proposed development would be consistent with that vision and would maintain the overall pedestrian character of the area. Nearby offices will generate pedestrian traffic for the proposed use. There will be pedestrian connections to the subject property by way of Bowman Mill Drive and Walter Johnson Road. There is a great likelihood that the proposed use will serve more pedestrians than office uses, generating less automobile traffic than an office.

2. Kenneth J. Colbert, P.E., qualified as an expert witness in the field of civil engineering and site planning.

Mr. Colbert prepared the SDP and explained how the proposed development will work. The proposal for the 69,718-square-foot site will only involve 55,965 square feet of the site, as some 13,753 square feet will be dedicated for the Walter Johnson Road right-of-way. The Applicant plans to develop the site with a combination convenience store and automobile filling station within a 3,100-square-foot building that will be limited to a height of 19 feet, maximum lot coverage of 5.5% and

minimum green area of 35%. The facility will have 25 parking spaces. The facility will operate on a 24-hour a day basis. The filling station use will have six gas pumps with multiple pump dispensers, two on each side and underneath a canopy. There will be two access points, one from Bowman Mill Road and the other from Walter Johnson Road. The proposal will not include any storage of waste materials, auto parts, refuse, and motor vehicles within the setback areas. There will be no motor vehicle repair on the site. The filling station will require approval of a special exception by the Board of Appeals.

Mr. Colbert indicated that the building will be constructed in a manner that will be compatible with existing development within the surrounding area. The architecture of the building will reflect brick treatment and will have a soft appearance consistent with the design concepts of the new urbanism that call for architecture on all four sides of the building, window treatment, a monument sign, and walkways to encourage pedestrian use. He conceded that architectural features are not part of any binding elements of the proposal. Lighting will be subject to the approval of the Planning Board during the site plan review process. At this time the lighting plan envisions a design that would prevent light from shining off the premises. The light poles will be about 20 feet high, including a three-foot base, and may include up to ten poles depending on the final site design. A monument sign will be placed on a three-foot base and contain a 25-square-foot illuminated sign. The building will be screened from nearby uses.

Mr. Colbert indicated that the proposed building will be much smaller than other buildings in the area and will fit very well with the immediately adjacent commercial type uses. For example, the building will blend in with the Verizon Dial Center, the copy center and the offices in the area. Other uses will be adequately screened from the site because of intervening uses. For example, the Pumphrey/Mateney House is 800 feet from the site and is screened from it by the Verizon building and trees. Other buildings also screen the veterinary clinic from the site. He concluded that the development will not have any adverse impact on the Historic District and will not cause adverse impacts on its neighbors in terms of noise, lighting, visual perception, or physical activity. He conceded

on cross-examination that retail uses are normally considered to be more intensive than office uses, Tr. May 15, 2001, p. 189.

Mr. Colbert concluded that the proposal conforms to the requirements of the C-3 Zone. The site is located adjacent to a major highway and the proposed uses are highway-oriented uses. The proposed uses will also generate pedestrian traffic that will use walkways provided by the developer to Bowman Mill Drive and Route 118. The proposed use will provide more pedestrian activity than office uses. He conceded that the setbacks as shown on the SDP might have to be adjusted based on the Planning Board's site plan review. The C-3 Zone requires a 50-foot setback from the 120-foot right of way for Route 118. See § 59-C-43.67 (a)(4). However, the Planning Board may grant a waiver to this provision.

Mr. Colbert testified that public facilities are in place to serve the proposed development. Water and sewer facilities are available and there are no capacity problems. The site is classified in water service category, W-3, and sewer service category, S-3. An existing regional stormwater management facility is located south of the MARC parking lot and this facility will be used to handle water quantity through underground pipes from the site. The site will contain a water quality facility. A stormwater concept plan was approved by the County's Department of Public Works and Transportation. The Technical Staff indicated that Forest conservation requirements have been satisfied, Ex. 56.

3. Aris Mardirossian is a resident of Germantown and a principal in the Applicant entity.

Mr. Mardirossian explained that the subject property was created from parcels owned by Verizon and Montgomery County. The subject property was subdivided so it is separated from the Verizon parcel by the dedicated right-of-way for the extension of Walter Johnson Drive. Verizon has received site plan approval for the development of a two-story, 13,000-square-foot office building on its new subdivided parcel, as well as a pending application for modification of its dial center special

exception. The Applicant has satisfied the forest conservation requirements for the subject property by providing a forested 1.4-acre off-site parcel.

Mr. Mardirossian indicated that he has developed similar facilities in both Montgomery and Frederick Counties. When developing these facilities, he usually meets with civic organizations and other community groups in order to ascertain their concerns and incorporate their suggestions into the proposal. He followed this procedure in this case and has gotten the support of the Germantown Civic Association and the Germantown Alliance. He plans to operate the facility on a 24-hour a day basis, seven days a week.

Mr. Mardirossian testified that he purchased the site after a careful study and survey of area businesses to determine whether or not he could compete successfully with similar uses. He believes the location near the MARC station, its parking lot and nearby office uses will generate adequate pedestrian trade for the convenience store. In addition, he determined that the zone pricing techniques of big oil companies make this a good location for an automobile filling station because it can provide more competitive pricing than is currently available in Germantown. His survey indicates that gas prices in Germantown tend to be substantially higher than charged by similar stations in Rockville. He attributes this price disparity to the lack of price competition in Germantown. He intends to buy gasoline on the spot market. He is not dependent on big oil companies for his pricing. He intends to offer Germantown lower gas prices than available at existing Germantown gas stations.

4. Kathryn Kuranda, qualified as an expert witness in the fields of architectural history, history and historic preservation.

Ms. Kuranda described the only two historic resources in the TC-6 Analysis Area. The Madeline Waters site at one time contained a historic house that was destroyed. The site remains a historic site and it contains an allay of trees but no standing structures. The Pumphrey/Mateney House is adjacent to the MARC parking lot and contains a late 19th Century Victorian dwelling of 2-story frame construction. She concluded that the environmental area around the house has been compromised by a

parking lot. The Germantown Historic District is located across the CSX railroad tracks, which are located in a deep ravine. The Historic District contains structures that date from the late 19th Century. The Historic District constitutes a very recognizable entity of late 19th Century vernacular houses with a single commercial structure, an old bank, and the railroad station. The Historic District is separated from the Analysis Area TC-6 by the railroad tracks, which are generally used as boundaries for such districts.

Ms. Kuranda indicated that new construction in the area is visible from the Historic District. This new construction includes a ridgeline of new townhouses, the MARC parking lot and the postal service distribution center. Conditions within Analysis Area TC-6 have affected the integrity of the historic resources in the area. These conditions include large areas devoted to parking which have changed the historic character of the area and compromised the remaining two historic resources.

Ms. Kuranda testified that there is nothing inherently incompatible with the C-3 Zone or office uses and the preservation of historic resources. For example, new retail and office uses are developed in a compatible manner in historic districts within the City of Frederick, the City of Alexandria and Georgetown. These uses can fit within the historic setting and the proposed development also would fit in because of its low-scale, service orientation of the convenience store, location of gasoline pumps on the interior of the property, the full articulation of architecture on all sides of the building, compatible materials, landscaping buffers and limited signage.

Ms. Kuranda concluded that the C-3 Zone could be consistent with the historic or architectural integrity of the historic resources within the Analysis Area TC-6, provided that design requirements are placed on the development. These design requirements include massing proportion, materials, the integration of pedestrian frontage, the full architectural treatment of all faces of the building, and adequate landscaping. She stated that these design requirements are necessary to achieve compatibility with existing historic resources. She concluded that the proposed development would be compatible with the historic resources within Analysis Area TC-6 and would have little impact on the

Historic District because of the distance between the district and the site. She noted that C-3 zoned property is located across Wisteria Drive from the Waters property, which has not been adversely impacted by it. She indicated that the necessary design requirements are normally a part of the site plan review process, but she conceded that she is not familiar with the requirements of the Montgomery County site plan review, Tr. June 15, 2001, p. 111.

Ms. Kurnada disagreed with the summary of the project presented by Ms. Soderberg, Ex. 70. She does not view the proposed use as garish in appearance with bright lights and continuous traffic. She concluded that the design review process will mitigate any problems and the use will not have any adverse impact on the Historic District, which is over 1,000 feet away.

5. Lee Cunningham, qualified as an expert witness in the fields of transportation and land use planning.

Mr. Cunningham described the area road network, which is anchored by Route 118, currently constructed as a six-lane divided highway and designated by the master plan as a major highway. Route 118 has a median break at its intersection with Bowman Mill Drive. North of the site is Wisteria Drive, which has a signalized intersection with Route 118. Middlebrook Road is likewise north of the site and has a signalized intersection with Route 118. Located southeast of the site is Walter Johnson Road, which functioned as old Route 118 before relocated Route 118 was constructed. Located immediately adjacent to the site is Bowman Mill Drive which was constructed under business street standards as part of the access road for the MARC parking lots.

Mr. Cunningham concluded that the proposed uses, a convenience store and an automobile filling station, constitute highway-oriented uses. He also concluded that the site has service road access by way of Bowman Mill Drive and Walter Johnson Road. He indicated that service road access could be provided over public or private roads. He stated that the State Highway Administration will not allow direct access to the site from Route 118, even though the site has extensive frontage along that road.

Mr. Cunningham conducted a traffic analysis of the likely impact of the proposed development on the road network. His analysis assumed the use of a convenience store and automobile filling station. The review was conducted based on input from the Technical Staff. For example, the staff directed him to examine intersections of Route 118 with Bowman Mill Drive, Wisteria Drive and Middlebrook Road and the intersection of Wisteria Drive and Walter Johnson Road. He conducted actual traffic counts at three of the intersections and estimated traffic at the Bowman Mill Drive intersection because his observation of traffic levels there indicated it was very light and a formal traffic count was unnecessary. The CLV standard for this area of the County is 1,500. All the intersections were found to operate within this level of service standard under existing conditions.

Mr. Cunningham applied a background traffic factor provided to him by the Technical Staff. This factor accounts for projected traffic from certain traffic policy areas, which is expected to be generated from approved but as yet unbuilt development. When this background traffic was considered, two of the intersections, Route 118 and Wisteria Drive and Route 118 and Middlebrook Road, were projected to exceed the 1,500 CLV standard during either morning or evening peak hours or both. For example, Wisteria Drive was projected to have a CLV of 1,758 in the evening peak hour and Middlebrook was projected to have a morning peak CLV of 1,517 and an evening peak CLV of 1,980. When the trips likely to be generated by the proposed development were added, the projected traffic was found to exceed the CLV standards by even a greater amount. For example, Wisteria Drive was projected to have an evening peak CLV of 1,783 and Middlebrook Road was projected to have a morning peak CLV of 1,518 and an evening peak CLV of 2,007. *See Ex. 21 (a), Table 3.*

Mr. Cunningham concluded that the apparent adverse impact of the proposed development on the road network can be mitigated by several improvements to the two intersections in question. For example, projected traffic conditions at the Middlebrook Road intersection can be improved by installing concurrent signal phasing and construction of a southbound-to-westbound right hand turn lane. Projected traffic conditions at Wisteria Drive can be improved by changing the

westbound-to-northbound exclusive right turn lane to a through and right turn lane. He concluded that both improvements would reduce the CLV to levels below background traffic conditions, which is considered to be acceptable traffic mitigation under adequate public facility standards. He also concluded that with the mitigation, the proposed development would not have any adverse impact on the road network or the surrounding area. However, he conceded on cross-examination that the proposed mitigation is not provided for in any capital improvement program or any other proposed commitment. Tr., July 24, 2001, p. 94. He contended that the mitigation would be required at the subdivision stage.

Mr. Cunningham made some comparisons among the proposed use, a fast food restaurant, and an office building, Ex. 84 (a) and (b). He found that the proposed use would be a more intensive use than a fast food restaurant based on total trips under the C-3 Zone. He concluded that it would be the most intensive use under the C-3 Zone. Moreover, when he compared the proposed use to a hypothetical office development of 25,000 square feet, he found that the office use would produce more traffic in terms of new trips on the road. He explained that the proposed use will attract pass-by trips that are already on the road and therefore will not generate as much new traffic as an office use. The 1998 Local Area Transportation Review Guidelines, Ex. 85, permit the use of a 15% factor for the new trip adjustment. He conceded on cross-examination that the Technical Staff criticized his use of pass-by trips as too high given the fact that the site will not have direct access to Route 118. See Ex. 39, p. 10 and Ex. 82.

Mr. Cunningham testified that the proposed use will not have any impact along Walter Johnson Road as the traffic impact from the site will take place almost entirely at the intersection of Bowman Mill Drive and Route 118. He indicated that turning movements from Route 118 into Bowman Mill Drive could be safely accommodated because of gaps in the traffic along Route 118. He concluded that sight distance was adequate, although this testimony was received over the opposition's objection that it was not part of his report. He concluded that the proposed use will not have any adverse impact on vehicles seeking access to the MARC parking lots. He conceded on cross-

examination that he did not measure the sight distances of access points to the site. Tr., July 24, 2001, p. 103.

Mr. Cunningham indicated that the master plan envisioned Walter Johnson Road as local access for adjacent properties. The master plan did not contemplate Bowman Mill Drive. Its subsequent construction provides direct access from Route 118 to the subject property.

In addition to testimony, the Applicant received support in the form of letters from nearby property owners and organizations. These included Ben Lewis, Ex. 14; Verizon, Ex. 16; Germantown Walter Johnson Property, L.L.C., contract purchasers of the Huie property, Ex. 17 & 36 (i); Germantown Alliance, Ex. 36 (f); Germantown Citizen's Association, Ex. 36 (e); Thomas Reinheimer, a resident of Germantown Estates, Ex. 38; W. Gregory Wims, a resident of Rockville, Ex. 60; and the Montgomery County Chamber of Commerce, Ex. 61.

B. Public Agency's Comments

1. Gwen Wright is the Preservation Coordinator for the M-NCPPC.

Ms. Wright participated in the development of the *1989 Germantown Master Plan* and is particularly familiar with the recommendations for Analysis Area TC-6, where the subject property is located. Analysis Area TC-6 was given careful consideration during the master plan process and it was viewed as a transitional area between the more intensely developed Town Center core areas located to the north and the Historic District to the south. The master plan envisioned that Analysis Area TC-6 would function as a quiet, pedestrian-oriented enclave that would provide relief from the intensity of the Town Center core areas. Analysis Area TC-6 is to maintain a strong visual and functional link to the Historic District using the pedestrian bridge. Ms. Wright does not consider the proposed development to be compatible with Analysis Area TC-6 or consistent with the master plan because of the intensity of the proposed use.

Ms. Wright testified that the commuter parking lot adjacent to Bowman Mill Drive was contemplated as part of the master plan review. Its subsequent development involved a high level of

design review and the parking area contains historic lighting, trees, street trees, and brick sidewalks. Even the tall security lights in the parking area contain special baffles so light is not projected into nearby residences. The master plan recommended Analysis Area TC-6 for the R-200 or the O-M Zones. She concluded that Analysis Area TC-6 has been maintained in a manner consistent with the master plan. The only building built in the area since the plan was adopted is a small, three-story office building that contains a copy center. The character of the area represents a low level, non-intensive office use, landscaped parking lots for commuter rail and several individual historic sites that are linked to the Historic District by the brick-paved pedestrian bridge over the railroad that enjoys wide community use. These sites include the restored Pumphrey/Mateney House and the preserved allay of trees around the former Madeline Waters house, which burned down about a week after its historic designation. The property is now the subject of review for a childcare center and bank.

Ms. Wright was subjected to extensive cross-examination. She conceded that Bowman Mill Drive was not contemplated by the master plan, but maintained that it contains streetscape that is in harmony with the Historic District. She also indicated that the community uses the adjacent commuter parking lot for recreational purposes on weekends. She conceded that there are other historic districts located elsewhere that permit gas stations within the district, although she contended that such a use is not consistent with the applicable master plan for this location. She also conceded that about one-third of the land area comprising Analysis Area TC-6 is currently developed for off-street parking uses. She acknowledged that the proposed development contains more green space than would be required under the recommended the O-M Zone. She also conceded that the proposed development is compatible with the surrounding area in terms of height, size and bulk.

2. Sue Edwards is the Team Leader for the I-270 Corridor planning unit of the M-NCPPC and is assigned the administration of the Germantown Master Plan.

Ms. Edwards indicated that the master plan contemplated a one-way loop road extending from Wisteria Drive parallel to Route 118 past the subject property and to a loop connection with Walter

Johnson Drive. The loop road was designated on the master plan as B-3 and was referred to as Bowman Mill Drive. The purpose of the planned loop road was to create small parcels in order to control the intensity of use and keep building within a small scale. When the MARC parking lot was constructed, a driveway was cut into Route 118 that was not contemplated by the master plan. The driveway was named Bowman Mill Drive as it extended between Route 118 and Walter Johnson Road.

Ms. Edwards indicated the master plan contemplated that when Route 118 was completed a pedestrian bridge would be located across the railroad tracks between Walter Johnson Drive and Liberty Mill Road. The bridge was completed by the Montgomery County Department of Public Works and Transportation and was opened to the public in November 2000. The bridge contains railings and landscaping to make it attractive as a pedestrian connection for both MARC commuters and area residents. She concluded that the MARC parking lot does not compromise the pedestrian character of Analysis Area TC-6 because it will only draw vehicular traffic during the morning and afternoon commuter times.

C. Opposition's Case in Chief

1. Susan Soderberg is a resident of Germantown and works as a public historian.

Ms. Soderberg is the author of several books and materials about the history of Germantown. She served as a member of the Montgomery County Historic Preservation Commission and also served on the Citizens Advisory Committee for the *1989 Germantown Master Plan*. She is one of the founding members of the Germantown Historical Society. She was qualified as an expert witness on historic sites and the Historic District of Germantown. She explained that the criteria for historic designation in Montgomery County as applied in the Germantown area involve historical and cultural factors. Architecture does not have to be a distinguishing characteristic. There is a focus on character of the area as exemplified by the cultural, economic, social, political or historic heritage of the community.

Ms. Soderberg indicated that the Historic District was originally settled as a rural railroad town where growth occurred on both sides of a railroad that was built in 1873. Old Route 118 was the

main street of the Town and it crossed the railroad tracks at grade. The railroad was not a point of division, but was a unifying factor in the town. In 1890, a bridge was constructed over the railroad. The current bridge replaced this bridge in 1927. Since the town was developed along both sides of the railroad, the people moved back and forth with regularity.

Ms. Soderberg testified that the original historic district, as approved by the HPC and the Planning Board, included both sides of the railroad tracks, particularly the Pumphrey/Mateney House and the Presbyterian Chapel, which is now the Lewis Veterinary office. When the County Council considered the proposed historic district, it decided to choose representative buildings. Those residential and commercial buildings grouped close together were designated as the Historic District. On the other side of the railroad tracks, the Pumphrey/Mateney House was designated as an individual historic resource outside the district. The Pumphrey/Mateney House had a store downstairs with a residence upstairs in a manner typical of 1890, when it was built. Next to the nearby chapel was a garage used for fixing cars in the 1920s.

Ms. Soderberg concluded that the master plan intended Analysis Area TC-6 as a buffer to maintain the character of the area with streetscape and trees and to keep out intrusive lighting. In order to unify the separate historic resources, the bridge over the railroad was converted into a pedestrian bridge. It was designed to be compatible with the historic resources with brick paving stones, Washington-type streetlights, old-fashioned benches that blend with a historic setting, and iron fencing. The bridge has become a very popular amenity in the area and is heavily used by area residents. She concluded that while changes have occurred in the area, the criteria for keeping the ambiance of the historic area has not changed. Analysis Area TC-6 has developed as envisioned by the master plan with the construction of the pedestrian bridge and development of low-rise office buildings. She indicated that the Germantown Historical Society plans to nominate the chapel as a historic site and may also recommend the residences behind it for additional historic designation.

Ms. Soderberg concluded that the C-3 Zone and development under it will not be compatible with the historic ambience of the area because of traffic and other impacts. For example, nighttime noise and lights from traffic will have an adverse affect on these historic resources. The convenience store and gas station, operating on a 24-hour a day basis, will project intrusive lighting into the Historic District and will shine on the historic buildings in the area. She distinguished the tall lighting poles in the MARC parking lot because the parking lot is associated with the railroad use that formed the basis for the historic designation and concluded that the parking lot lighting does not create an adverse impact on the historic resources in the area. The parking lot was contemplated by the master plan.

2. John Viner, P.E., qualified as an expert witness in traffic analysis and traffic safety.

Mr. Viner conceded that his testimony as an expert witness has only been on behalf of the opposition in zoning cases. He reviewed the Applicant's traffic report and provided a critique of it, stating that the report understates the true impact of potential development under the C-3 Zone. The site is large enough for a large potential structure that could occupy minimum lot coverage of 19,588 square feet and have a maximum height of 42 feet. For example, a fast food restaurant could be developed with two stories and surface parking could be increased. On cross-examination he conceded that a subsequent amendment to the SDP superseded his conclusions about maximum potential development.

Mr. Viner provided extensive testimony about the failure to include the true impact of background traffic in the analysis. He contended that the Technical Staff exercised its professional judgment in an inconsistent and arbitrary manner regarding the selection of appropriate TAZs. The Germantown West Policy Area contains some 12 TAZs and only four were selected for the analysis of the intersection of Route 118 and Middlebrook Road, that is, zones 252, 282, 283 and 284. In a traffic analysis for the Bellemead Development Corporation, dated February 2000, Ex. 93 (b), the staff applied eight TAZs for background traffic projections for the same intersection, which included TAZs 248, 249,

250, 251, 254, 282, 283 and 284. If just one of these additional zones were applied to the facts of this case, it would show that traffic conditions along the Route 118 corridor will be much more congested than projected by the Applicant's study and the proposed mitigation would be inadequate. He conceded on cross-examination that the Bellemead project involves a substantial amount of mixed-use density on a 24-acre parcel. While he contended that the size of the parcel should not affect the use of background traffic at the intersection, he conceded that each case must be evaluated on its own facts and circumstances and the selection of background traffic involves a judgment call.

Mr. Viner testified that the inclusion of TAZ 253, which was not included in the Applicant's study, would significantly increase congestion along Route 118 at several intersections. He used the new *Trip Distribution and Traffic Assignment Guidelines*, April 2000, Ex. 87, to show that actual data provides more realistic projections than the assumptions used by the Applicant. This data shows that a large proportion of office and residential traffic has origins and terminations outside the Germantown-Clarksburg super-district and the Applicant's analysis only accounts for a fraction of the background traffic within the super-district. When the residential development of TAZ 253 is distributed over the road network using the guidelines, it reflects a significant increase of future traffic at intersections along Route 118 toward the I-270 interchange. If office development or more TAZs are analyzed, the traffic increase will reflect huge volumes that are unaccounted for in the Applicant's study. The a.m. peak hour traffic at the intersection of Route 118 and Wisteria Drive will exceed the 1,500 CLV standard. The Applicant failed to identify any mitigation for this problem at the Wisteria Drive intersection.

Mr. Viner contended that the Applicant's study failed to properly evaluate the intersection of Bowman Mill Drive and Route 118. The Applicant did not perform a traffic count at the intersection based on an observation that the level of traffic was too small to make it necessary. What the Applicant failed to acknowledge is the fact that the intersection is principally intended to provide access to the MARC commuter parking lots and the traffic to and from these lots is keyed to the arrival

and departure of the trains. The peak traffic therefore coincides with the train schedule. The analysis should have measured the traffic at the intersection at these times because the traffic levels will be significantly impacted by the proposed development, as it will rely almost exclusively on Bowman Mill Drive for its access. Therefore, the traffic analysis should have included vehicular turning movements to and from Route 118 onto Bowman Mill Drive to permit evaluation of any potential conflicts between the commuter traffic and the customer base for the proposed development.

Mr. Viner criticized the Applicant's failure to properly evaluate safety factors at the same intersection. The safety analysis was not based on any actual measurements of sight distance or gradations of highway speeds. Therefore, there was no factual basis for the Applicant's conclusions that this access point is safe, adequate and efficient given the use of the intersection by MARC commuters. Both safety and capacity issues were inadequately addressed.

Mr. Viner also criticized the Applicant's failure to include intersections along the path to the I-270 interchange. His own analysis found that the intersections of Route 118 with Crystal Rock Drive and Aircraft Drive would include through traffic that passes through the policy area and will use I-270. These intersections are located between the intersection of Middlebrook Road and the I-270 interchange and form logical points of analysis given the historic traffic patterns as shown by the data provided by the M-NCPPC material, Ex. 87.

Mr. Viner contended that the Applicant should have provided an analysis of the intersection of Route 118 and Dawson Farm Road, which is located only 600 feet from the Bowman Mill Drive intersection. The Applicant's own evidence shows visual queues at this intersection and it has potential impact on the operation of the Bowman Mill Drive intersection. *See* Ex. 43 and 44.

Mr. Viner concluded that the road network is similar to a water pipe system. When the volume of water reaches capacity, the flow will slow down. Likewise, the very large volume of approved development within the Germantown West Policy Area will cause traffic along Route 118 and

its intersections to become very congested. The mitigation proposed by the applicant is inadequate given the potential level of congestion that will likely occur.

3. Burt Ashton, an active service station dealer in Montgomery County for the past 36 years.

Mr. Ashton submitted a petition signed by 800 people in opposition to the proposed development. Ex. 102. He explained that there are six automobile filling stations located on the west side of I-270 in Germantown and these stations combined pump less than 10 million gallons of gasoline a year. The Applicant has grossly exaggerated the annual volume of gasoline at 20 million gallons a year. The Applicant has also misstated the ability to cut gas prices below the market rates in the Germantown area. A new state law prohibits dealers from selling gasoline below cost. The addition of another gasoline station will have an adverse impact on the existing stations because it will lower individual sales volumes and require dealers to increase prices just to cover fixed costs.⁷

Mr. Ashton also testified that the combination automobile filling station and convenience store operating on a 24-hour basis would stand out like a sore thumb in a residential area. The lighting would make the use look like "daylight at midnight". He contended that the use would also attract 2,000 trips a day as well as frequent delivery trucks and large tankers.

4. Judith Christianson is an architectural historian and preservation planner who qualified as an expert witness in the field of preservation planning.

Ms. Christianson indicated that historic preservation involves the preservation of history as a built environment. It seeks to preserve not only buildings, but the total environment which conveys a sense of a time and place that is different than the modern era. A historic district represents a collection of buildings, streets, and objects that convey a sense of time and place. A historic district also includes mature trees, streetscape, fencing and other objects that contribute to the historic character of

⁷ This testimony is not accorded weight because it deals with the issue of need, a factor to be evaluated by the Board of Appeals in a special exception proceeding if the zoning request is approved. Need is not a factor in this zoning case.

the area. The Germantown Historic District is defined as a late Victorian rural agricultural village with an association with the railroad.

Ms. Christianson also testified about landmark sites that she referred to as single site historic districts. These landmark sites are evaluated for their historic designation based on higher standards than some buildings in a historic district. For example, a historic district may include buildings that are noncontributing resources or have lesser importance historically. But a landmark site must possess a high level of integrity. In other words, the site must have a high level of historic or cultural significance to obtain designation as a historic resource. Analysis Area TC-6, where the subject property is located, has two such landmark sites: the Pumphrey/Mateney House and the Madeline Waters property, which at one time contained a historic house that was subsequently burned down (the property and an allay of trees that were adjacent to the house remain as a historic resource so the HPC retains some regulatory control over development).

Ms. Christianson indicated that the Pumphrey/Mateney House was related to the railroad because a merchant lived in the house, had his store there, and depended on the railroad to receive goods to serve his customers. The house was linked to buildings across the railroad tracks and is still a historic resource that is consistent with and forms a part of the rural character of the Historic District with which it is now linked by the pedestrian bridge. She indicated that the Madeline Waters site and its allay of trees is not compromised by C-3 zoning on the other side of Wisteria Drive but it was compromised by the destruction of the historic house by fire.

Ms. Christianson concluded that the Historic District and Analysis Area TC-6 are dependent on each other and are linked by their historic resources. She cited the master plan as specially designating Analysis Area TC-6 as a transitional area designed to protect the historic resources, which consist of the Historic District itself and the nearby historic landmarks.

Ms. Christianson concluded that the master plan recommendations for this area have been implemented. What she considers to be a historic bridge has been refurbished to include features that

enhance its historic character. The bridge refurbishment was the subject of an award for reuse of a historic resource. The bridge was closed to vehicular traffic and provides a direct link for pedestrians between Analysis Area TC-6 and the Historic District. Bowman Mill Drive, which was not specially recommended by the master plan, was planned and designed to provide direct access to the MARC parking lots that might have been underutilized if access was difficult. The street was framed with trees and ornamental street lights to complement the historic resources. From Route 118, the street frames the Pumphrey/Mateney House and acts as a farm lane or driveway to a farmhouse. Ms. Christianson stated that the street has a perfect design to convey the sense that historic resources are nearby and provides an entranceway to the Historic District that is accessible to commuters and other pedestrians who use the parking lots. The street has not compromised the Historic District, Analysis Area TC-6 or the recommendations of the master plan. She conceded on cross-examination that the MARC parking lots do not convey a sense of time and place, but they do contribute to a sense of quiet, peaceful environment endemic to Analysis Area TC-6.

Ms. Christianson concluded that the proposed development would not be compatible with the surrounding area. She defined compatibility to include intensity of use, which she considers to be the biggest problem with the proposed development. The intensity of use will generate continual automobile traffic into and out of the site and will compromise the quiet, passive and pedestrian character of the area. The use is automobile-dependent and does not conform to the master plan. The use is out of place at this location because the intensity of use is inappropriate for Analysis Area TC-6. The transitional function of the area is to buffer the rural character of the historic resources from the more intensive uses of the Town Center core areas on the other side of Wisteria Drive. The proposed development will have an adverse impact on the rural character of the area because its level of activity is not sensitive to the area's transitional function. The 24-hour-a-day activity represented by the introduction of the C-3 Zone at this location is much more activity than planned for under the master plan. Even with good architectural design, the incompatible function of the activity will remain.

Ms. Christianson indicated that within Analysis Area TC-6 the intensity of uses diminish as proximity to the Historic District increases in order to protect the rural character of the District. The highest intensity uses within Analysis Area TC-6 are located within the professional office park next to Wisteria Drive and furthest away from the Historic District. The subject property is planned for a low-intensity office use and not the continual automobile traffic that would be generated by the proposed use. This transitional area needs to have development that provides diminished activity near the Historic District.

Ms. Christianson indicated that the C-3 Zone does not provide the type of regulatory oversight upon which the Applicant's evidence relies. Neither the zoning nor site plan review stages provide the necessary design review or other safeguards that would be provided by the HPC. Design review is a tool for the historic preservation process and it is absent from the site plan process under the C-3 Zone. There are no safeguards available under the C-3 zoning process to protect the sense of time and place that is inherent in the character and ambiance of the area. She acknowledged on cross-examination that a gasoline station is located within 200 feet of the historic railroad station in Gaithersburg without any detriment to the historic resource. However, she indicated that the station is located in an urban setting and Gaithersburg has architectural and design review controls that are not present in the C-3 zoning process. She conceded that she has not participated in the Montgomery County site plan review process before the Planning Board.

Ms. Christianson contended that the Applicant's plan for a new urbanism style for the proposed use would be inappropriate and incompatible for the location. The new urbanism architectural style is intended for urban settings, while old town Germantown represents a rural village that never was urban in character.

5. Harry Murphy is Director of Technical Services for the Washington, Maryland and Delaware Service Station and Automobile Repair Association

Mr. Murphy testified in opposition to the requested zoning. He indicated that the service station business is in a state of flux and is changing by the month. Government regulation has not kept up with the changes. The traditional gasoline pump and car repair service station is giving way to the increasing appearance of use combination that merges gasoline pumps, a convenience store and more recently, fast food service. Industry literature provides information to show that over the past ten years sales in the combination gasoline and convenience facilities has doubled and has increased eightfold in the last 20 years. At the same time, the sale of gasoline has declined by 1.6%. See Ex. 105.

Mr. Murphy indicated that the new combination facilities are embracing a destination place market strategy and are producing more traffic. Oil companies are building larger and larger facilities and some are becoming super convenience stores such as are operated by Sheetz, Wa Wa, and Royal Farms. Some oil companies are entering into partnerships with fast food companies like McDonald's, Wendy's and Arby's. Financial services and convenience services are included in larger buildings. He predicted that the proposed development, if approved, would be subject to enlargement in the future. He conceded during cross-examination that his opposition is at least partially based on a desire to have less competition for his membership.

6. Robby Pollinger operates the Middelbrook Amoco station in Germantown.

Mr. Pollinger's station is not located in the same service area as the proposed use because he is located on the east side of I-270. He opposes the proposed development because it will contribute to the creation of a gasoline alley along Route 118 and undermine the historic preservation efforts of the master plan. He noted that Germantown was originally founded along the Route 355 corridor but it moved to the west with the introduction of the railroad. The Pumphrey/Mateney House was a general store at the time. Analysis Area TC-6 is a quiet, green and pedestrian-oriented area. The master plan envisions it as a transitional area to protect the historic resources in and adjacent to it.

7. Raymond Howar is a resident of the Historic District in Germantown.

Mr. Howar purchased his home 11 years ago after examining the master plan and consulting with the Technical Staff about the development potential within Analysis Area TC-6. He was advised that the area is considered a transitional area intended only for residential uses and low-density offices. He can see the subject property from his home. His house is at an elevation similar to the subject property and is located about 810 feet from the subject property. His property line is only 660 feet from the subject property. .

Mr. Howar presented a series of photographs to illustrate the character of the Historic District and its links to the Pumphrey/Matney House and the MARC parking lots by way of the pedestrian bridge. Ex. 111(a). There are several historic homes near his home that are located on the ridge of the Historic District. His property slopes down to Matney Hill Road and the MARC station and its parking area, which are located just beyond the road. There is a building on his property that is one of the oldest buildings in Germantown. In the past it was used as a post office, butcher shop and barber shop. It is now used as a guest cottage.

Mr. Howar indicated that the pedestrian bridge is a gathering place for people and an attractive addition to the community with benches, lights and landscaping that were placed around the bridge. He described the entranceway to the Pumphrey/Matney House by way of Bowman Mill Drive as attractively framed by street trees, ornamental lighting, landscaping and pedestrian walkways to the bridge.

Mr. Howar once worked for a family development business and appreciates the problems of developers. However, the major problem with the proposed use is that it constitutes a very different type of use with a continuous level of activity over a 24-hour a day operation. He will see this activity every day. The activity and lights will have an adverse impact on his home and the historic resources in the area. The proposed use is incompatible with the area and will serve to introduce an alien use into a

transitional area that will open the door for the introduction of other retail uses into an area with a passive, rural character.

Mr. Howar indicated that the MARC line operates about five or six trains during the morning schedule, which begins about 5:30 a.m. and extends to about 8:30 a.m. In the evening, the schedule reverses and the trains run from about 3:45 p.m. to 8:30 p.m.

8. Jacquelyn Magness Seneschal is a community planner who qualified as an expert witness in the field of land planning.

Ms. Magness Seneschal described the relevant surrounding area as including those areas directly impacted by the proposed development. This area is bounded by Wisteria Drive, Route 118, the back of the ridge of the Historic District and Mateney Hill Road to the stormwater management facility and back to Wisteria Drive. This area includes master plan Analysis Areas TC-6 and a small part of CL-1. It excludes Analysis Area TC-7, which includes the post office.

Ms. Magness Seneschal defended the inclusion of the Historic District because it is linked to Analysis Area TC-6 by four pedestrian crossings. The two areas are also linked by the master plan. She explained how Analysis Area TC-6 and the historic area have formed a single entity for a long time as illustrated by a sketch of old Germantown as it existed in 1922, Ex. 73, p. 154. The Pumphrey/Mateney House actually faces the railroad, which shows its link to development on the other side of the railroad tracks. Analysis Area TC-6 functions as a transitional area for the Historic District. It is not possible to separate the MARC train station and the parking lots because commuters must pass between the two. The parking lots are inherently part of the train station. There is heavy pedestrian activity in this area. The Applicant's reliance on the surrounding area applied in LMA G-595 is misplaced because the zoning was approved before Route 118 was relocated and vehicular and pedestrian traffic patterns of the area were changed.

Ms. Magness Seneschal criticized the Applicant's surrounding area because it excluded the Historic District and yet included uses on the other side of Route 118, which are separated by a

substantially greater barrier than the railroad tracks. She also criticized the Technical Staff area as extending past Wisteria Drive to include areas that will not be impacted by the proposed development because of distance and separation by the road.

Ms. Magness Seneschal indicated that Bowman Mill Drive was built as a two-way driveway to the MARC parking lots by the State of Maryland when Route 118 was relocated. The road was extended past the parking lot to Walter Johnson Road in an attempt to follow the alignment of the master planned one-lane loop road. The road is identified on two plats as a private drive within the MARC parking lot, Exs. 5 and 6. The road was not built according to Montgomery County standards and the State owns the right-of-way. Nevertheless, the County agreed to maintain it as a public road. The road leads directly to the Pumphrey/Mateney House as she illustrated with photographs, Ex. 119 (a) and (b). The road was also constructed with a human scale streetscape that provides pedestrian walkways, trees and Washington-style lights along both sides of the road as illustrated by photographs, Ex. 120 (a) to (d). A small pedestrian park is located near the Pumphrey/Mateney House and the pedestrian bridge. The introduction of Bowman Mill Drive has created a pedestrian friendly environment and helps keep the area consistent with the goals and objectives of the master plan.

Ms. Magness Seneschal concluded that the character of the surrounding area is quiet and pedestrian-oriented and it is very different from the Germantown Town Center core areas to the north, which have much more intensive uses and activities. She indicated that the introduction of Bowman Mill Drive has not altered the character of the area, which remains a quiet and pedestrian-oriented enclave. She characterized the traffic that uses Bowman Mill Drive as generally creating little activity except for the short bursts of traffic that coincide with the arrival of commuter trains. The train schedule is limited and begins about 5:45 a.m. and continues until about 8:30 a.m. In the afternoon and early evening, short bursts of traffic are confined to the train arrivals between 3:00 p.m. and 7:00 p.m. There is very little vehicular activity in the parking lots on the weekend and the area is used for community

activities. The addition of the proposed development would double the traffic during train arrivals and continue with a constant stream of vehicles throughout the 24-hour a day operation.

Ms. Magness Seneschal concluded that the proposed development would not be compatible with the surrounding area because of the significant level of activity that would be introduced to the area. The proposed use would attract significant and constant flow of traffic from Route 118 during the 24-hour period of operation. This traffic will make the pedestrian areas less attractive and will impair the quiet, pedestrian character of the area. A convenience store is a highway use and would bring vehicular traffic into a pedestrian-oriented area. This would create hazards for pedestrians and discourage the development of pedestrian-oriented uses. The location of the C-3 Zone on the subject property could lead to the extension of C-3 zoning to other undeveloped parcels and change the character of the area and make it easier for other inappropriate development. She conceded on cross-examination that potential development under the O-M Zone could produce more bulk and mass and less green space than is proposed by the SDP. She also conceded that automobile filling stations have been built at other locations in a manner that is compatible with adjacent uses.

Ms. Magness Seneschal concluded that the proposed development is at odds with the objectives of the C-3 Zone. The subject property fails to meet the locational standards of the C-3 Zone relating to master plan designation and proximity of other C-3 zoned property. While the property does abut a six-lane road, the C-3 Zone is geared for highway users and promotes vehicular traffic. It is not intended for areas that are dependent on pedestrian traffic and the Applicant presented evidence showing a dependence on pedestrians. This area is inappropriate for the location of the C-3 Zone because of its pedestrian-oriented character.

Ms. Magness Seneschal concluded that the proposed development is directly contrary to the recommendations of the master plan and will impair the character of the area. It will locate a high traffic generator in an area that is planned to remain as quiet and pedestrian-oriented in character. Indeed, the O-M Zone, which is recommended for this area as a low-intensity use, does not permit either

automobile filling stations or convenience stores. The provisions of the master plan dealing with both Analysis Areas CI-1 and TC-6 make clear that the area is intended as a transition to protect and buffer the Historic District and historic areas from the high intensity uses of the Town Center core areas. She concluded that the master plan objectives for this area have been achieved by the zoning pattern and the pedestrian-related amenities.

Ms. Magness Seneschal emphasized that a lot of public resources have gone into the protection of the historic resources and the promotion of the pedestrian and historic ambiance of the area. The Maryland Department of Transportation expanded the MARC service for this area and built extensive parking areas to encourage ridership. These facilities are operated as community activity centers on weekends when parking is light. The State also rebuilt the Germantown Train Station after it burned down as an exact replica of the original. Both the County and the State have made considerable efforts to promote the pedestrian character of the area by means of streetscape and other amenities including the pedestrian bridge to the Historic District.

In addition to the testimony a number of people who were unable to attend the hearing filed letters in opposition to the application. These letters generally raised the same issues that were addressed by the testimony. The letters were submitted by Montgomery Preservation, Ex. 26; Gerry and Florence Wixson, Ex. 27; Petition of 212 individuals, Ex. 33; Wm. S. Milford, Ex. 34; Donald R. Mackay, Ex. 37; Victoria F. Kaas, Ex. 53; Dorothy C. Medvitz, Ex. 80; R. Shegogue, Ex. 81; William Soderberg, Ex. 100; T.L. Alston, Jr., Ex. 107; Frank Blanchard, Ex. 108; Calvin Johnson, Ex. 109; R. Travis, CEO, Harmonia Gardens, Inc., Ex. 110; and McKinley Posely, Ex. 114.

D. Applicant's Rebuttal

1. Lee Cunningham, the Applicant's expert on transportation and traffic

Mr. Cunningham testified that he conducted traffic counts at Bowman Mill Drive and Route 118 on September 5, 2001 during the morning and evening peak hours, that is, between 7:00 a.m. and 9 a.m. and between 4:00 p.m. and 6:00 p.m. He found that the intersection operated at levels of

service A during both peak hours, which is consistent with his earlier observation that the MARC parking lot reflected low usage and therefore little traffic at the intersection. He indicated that there were 90 total turning movements exiting Bowman Mill Drive: 14 in the a.m. and 76 in the p.m. The a.m. involved five right turns onto Route 118 and nine left turns; the p.m. involved 18 left turns and 58 right turns. There were 137 total turning movements entering Bowman Mill Drive: 108 in the a.m. and 25 in the p.m. The a.m. involved 75 left turns from Route 118 and 33 right turns from Route 118. The p.m. involved 15 left turns from Route 118 and 10 right turns. *See, Ex. 101 (a) and (b).* A traffic light is not warranted at this intersection because traffic volumes are insufficient and the intersection operates at very good levels of service.

Mr. Cunningham concluded that traffic movements could be made to and from Bowman Mill Drive in a safe manner because of the levels of service and the gaps in traffic along Route 118 caused by the traffic signal at the intersection of Wisteria Drive and Route 118, which is located about 1,100 feet from Bowman Mill Drive. In addition, the sight distance at the Bowman Mill Drive intersection is adequate given the speeds along Route 118. He measured existing speeds along Route 118 and found that speeds were 57.2 mph or lower at the 85 percentile level, which means that only 15 percent of the traffic reflects higher speeds and no one was detected above 60 mph. The posted speed limit along this area of Route 118 is 50 mph. The sight distance at the intersection is 811 feet to the south and 770 feet to the north, which is acceptable to accommodate design speeds of 70 mph. The measured speeds are such that there is sufficient sight distance to accommodate safe turning movements to and from Bowman Mill Drive.

Mr. Cunningham also reviewed the impact of the proposed development and concluded that the traffic impact will largely impact the intersection of Bowman Mill Drive and Route 118. This traffic will be locally oriented as opposed to the existing traffic using Bowman Mill Drive for access to the MARC parking lots, which is regionally oriented. He indicated that the proposed development will experience a fairly high driveway volume entering and exiting the site. Tr. Sept. 11, 2001, p. 105. The

a.m. peak hour reflects 74 total trips into the site and 74 out of the site. This volume reflects 19 diverted trips, meaning trips already on the road network that needed to make a diversion to Route 118 and Bowman Mill Road, 44 pass-by trips, and only 11 new trips on the road network. The p.m. peak reflects 131 trips in and out of the site and is composed of 46 diverted trips, 66 pass-by and only 19 new trips. *See*, Ex. 21 (a), p. 10, Table 3 and pp. 12 and 14, figures 8 and 9.

Mr. Cunningham reaffirmed his earlier testimony that the proposed use or a fast food restaurant would be the most intensive uses for the site under the C-3 Zone. The Technical Staff determined the levels of background traffic to be used in the traffic analysis and he agrees with this determination because it provides sufficient potential future development to adequately assess the impact of the proposed development on the road network. A smaller project like the one proposed will have an impact over a smaller area. The impact of the development on the TAZs evaluated by the Opposition will be negligible.

Mr. Cunningham reviewed the Bellemead traffic study cited by the Opposition. *See*, Ex. 99. This project involves some 250,000 square feet of mixed-use development. The size of the project will have an impact on other TAZs and over a more diverse transportation network. In the Bellemead study there is more opportunity to disperse background traffic over a larger road network. The Bellemead study is simply not relevant here because the proposed development will not draw traffic from such a wide area.

Mr. Cunningham disagreed with the use of TAZ 253 as part of background traffic because it is served by an entirely different road network than the subject property and has access to Clopper Road and the Great Seneca Highway. The intersection of Middlebrook Road and Route 118, which is used in the analysis of the proposed development, is located further from I-270 and has access to other roads that render the Opposition's projection of background traffic for this intersection unreasonable. The same is true for the Opposition's contention that the intersections of Route 118 with Aircraft and Crystal Rock Drives should be included in the traffic analysis. The proposed use will only

serve local uses drawing on primarily pass-by and diverted trips and will not attract many destination trips as would a large project such as the Bellemead project cited by the Opposition.

Mr. Cunningham also disagreed with the Opposition's conclusion that a.m. peak hour mitigation is required for the intersection of Route 118 and Wisteria Drive because the distribution of traffic under the Opposition's analysis is overstated. The TAZs used by the Opposition are served by other roads that will dilute impact on this intersection. The intersection will not require any a.m. peak hour mitigation based on the background traffic levels that will reasonably impact this intersection.

2. Kenneth Colbert

Mr. Colbert testified that a maximum area of 1,850 square feet for a customer sales area is required for an accessory convenience store to an automobile filling station. At the special exception stage, a floor plan must be presented to the Board of Appeals. The proposed 3,100-square-foot building represents the normal size of a convenience store that he designs for 7-11 stores with or without an automobile filling station. The 3,100-square-foot size is necessary to support the accessory convenience store customer sales area, as the extra space is needed for offices, bathrooms and storage.

Mr. Colbert concluded that the proposed development would not be able to accommodate a car wash or more gasoline pumps because of the 35% green space-binding element. He indicated that the smallest car wash would require a minimum width of 12 to 14 feet and a length of 32 to 38 feet. On cross-examination he indicated that the proposed 25 parking spaces shown on the SDP is illustrative and only 15 spaces are actually required. However, even if the parking is reduced to the minimum necessary, he concluded that there would be insufficient space on the site to reasonably accommodate a car wash and more than the 12 gasoline pumps proposed.

3. Kathryn Kuranda

Ms. Kuranda testified that the MARC parking lots have had an impact on the historic setting of the Pumphrey/Mateney House. The parking lots are not a resource that would be found in 1870 when the house was built. The parking lots contain tall, 30-foot lights that are designed in a

contemporary style and do not contribute elements to any historic setting in the area. They are not areas that encourage green space or quiet passive zones. The parking lots constitute an urban type use because they are associated with areas of concentrated development that require parking and primarily characterize vehicular-oriented uses. The proposed use could incorporate design features that provide possible pedestrian access. Urban and rural areas are distinguished generally by intensity of development as opposed to architectural style.

Ms. Kuranda contended that there are other rural crossroad communities in Montgomery County where a retail outlet exists along with gasoline pumps. General stores form an integral part of the rural communities of Boyds and Dickerson and the stores include gasoline pumps. These communities are compatible with the historic development of Germantown. She conceded on cross-examination that the general stores in these communities did not resemble the proposed development in that they do not contain 12 pumps, a canopy over the pump area or a 7-11 type convenience store.

4. Philip E. Perrine, P.E., the Applicant's expert land planner

Mr. Perrine disagreed with the Opposition's version of the surrounding area. It is not appropriate to cut off the surrounding area at Route 118 and ignore the uses on the north side of the road that are directly across the road from the subject property. This area is already developed and these uses clearly have an impact on the subject property given the fact that it possesses 257 feet of frontage along Route 118. When the subject property is developed both properties will impact each other and this potential impact should be evaluated by extending the surrounding area to the north across Route 118. He conceded that Route 118 forms the northern boundary for Analysis Area TC-6 and the surrounding areas adopted in the zoning case he used for precedent for his surrounding area, LMA G-595. Nevertheless, he contended that the property at issue in LMA G-595 was more centrally located within the surrounding area and, given the location of the subject property at the edge of Analysis Area TC-6, it is appropriate to extend the surrounding area to the north.

Mr. Perrine disagreed with the Opposition's extension of the surrounding area into the Historic District. He conceded that there is a linkage between the Historic District and Analysis Area TC-6, but contended that this linkage is predominately limited to the passage of commuters back and forth between the rail station and the parking lots. The linkage has not stopped the District Council from using the railroad tracks as the boundary for the surrounding area for LMA G-595 and between Analysis Areas TC-6 and CL-1. The surrounding area should follow the boundaries for Analysis Areas TC-6 and TC-7 except for the uses along the north side of Route 118.

Mr. Perrine concluded that the location of the C-3 Zone at the subject property will not impair streetscape, trees and lights along Bowman Mill Drive because these same amenities will also be required along both Bowman Mill Drive and Walter Johnson Road extended. The C-3 Zone at this location will not impair the panoramic view of the Pumphrey/Mateney House. The proposed access point to the subject property from Bowman Mill Drive will be 137 feet from Route 118, while the length of Bowman Mill Drive is 450 feet. There is no restriction to the use of Bowman Mill Drive for access to the subject property and both that street and Walter Johnson Road will serve as service roads for the proposed development.

Mr. Perrine disagreed with the Opposition's characterization of Analysis Area TC-6 as a passive and pastoral area. When the master plan was adopted in 1989, the description of the area as a passive, pastoral and pedestrian-oriented enclave was based on the existence of some residential uses along Walter Johnson Road, then old Route 118, some rented bungalows in back of the veterinary clinic and the planned one-way access by way of Wisteria Drive. There are significant changes to the area that have altered the master plan's stated character. Relocated Route 118 has become a major thoroughfare with a traffic volume of some 24,000 vehicles a day. The two MARC parking lots were planned for 388 spaces, one lot with 138 spaces and the other with 250 spaces. However, 535 spaces were actually constructed. The addition of Bowman Mill Drive also became a second access to the enclave. The enclave itself is currently developed with 50,000 square feet and when all approved zoning is built out, it

will reflect 170,000 square feet of development. This development includes the medical center townhouses, the Lewis property, the copy center and the planned childcare center, Verizon and the undeveloped Huie parcel next to the subject property. This ultimate development will change the atmosphere of the area. He conceded that the development was anticipated by the master plan.

Mr. Perrine concluded that the proposed development is compatible with the area and will not discourage pedestrian activity. There will be lots of opportunities for pedestrians to walk to the convenience store. In fact, the convenience store will generate more pedestrian traffic than would office uses. Medical offices and the childcare center will generate vehicular traffic in the area. Many of the uses cited by the Opposition as potentially incompatible uses under the C-3 Zone are not feasible or practical at this location.

E. Opposition's Surrebuttal

1. John Viner, the Opposition's expert on traffic analysis and traffic safety

Mr. Viner testified that the proposed development is not the most intensive use under the C-3 Zone because the Applicant has not limited the number of gas pumps for the automobile filling station and has not precluded a car wash on the site. The Local Area Transportation Review Guidelines, Ex. 85, p. 29, Table 7, item 4, show that an automobile filling station, convenience store and car wash has a trip generation rate of 17.33 peak hour trips per pump while the rate used by the Applicant without the car wash is 12.28. The increase would result in an increase from 148 peak hour trips to 200 peak hour trips or a 40% increase in traffic. In addition, the number of pumps could be increased because there is no limitation in the SDP on pumps and this could substantially increase traffic. He conceded on cross-examination that the car wash is only an accessory use to the automobile filling station under the C-3 Zone. He also conceded that he is unaware of distinctions between trip generation rates for convenience stores that are considered accessory to automobile filling stations and those that are conventional convenience stores and operate as primary uses.

Mr. Viner indicated that the new traffic counts and traffic information provided by the Applicant during rebuttal contains the same flawed assumptions about background traffic that were contained in the original traffic study.

V. ZONING ISSUES

The zoning issues in this case involve procedural and substantive issues. The procedural issue is addressed first because it involves the number of affirmative votes required to approve the application.

A. Voting Requirements

The Planning Board recommended denial of the application by a split 2-to-1 vote. At the request of the Applicant and over the objections of the Opposition, the Planning Board was requested on two occasions to reconsider the application. On both occasions, the Board declined to do so. The master plan does not recommend the subject property for the C-3 Zone. The master plan was adopted in 1989 after the creation of the C-3 Zone. These circumstances trigger provisions of the Zoning Ordinance and the *Regional District Act*, the relevant provisions of which provide as follows:

A resolution granting a classification that is not recommended for the subject property by an approved and adopted master plan or sector plan or functional master plan requires the affirmative vote of 6 members of the District Council. However, if the Planning Board recommends approval of the classification, the resolution requires the affirmative vote of 5 members. [Zoning Ordinance § 59-H-8.2 (b)]

* * *

In Montgomery County, all applications which seek a zoning classification, either euclidean or floating, other than that which is indicated to be appropriate or suitable in the text or on the land use map of an adopted master plan, approved by the district council, under the provisions of § 7-108 (e) of this article, shall be granted only the affirmative vote of 6 members of the district council. If the application for reclassification is recommended for approval by the Commission or if the application is for a zoning classification created after the approval of the master plan by the council, then an affirmative vote of 5 members of the district

council is required to grant the application or applications....
[*Regional District Act*, Art. 28 Md. Code Ann. §8-104 (a)(2)]

Therefore, approval of the application will require the affirmative vote of 6 members of the District Council.

B. Substantive Issues

A floating zone may be located within sections of the County that are deemed appropriate under preset standards of the Zoning Ordinance and the State Zoning Enabling Act. The C-3 Zone is a floating zone and requires evaluation in terms of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and whether it bears sufficient relationship to the public interest to justify its approval. As zoning is the most discretionary point in the land development process, these provisions are not mechanically applied and a zoning applicant bears the burden showing that each and every element of the zoning requirements is satisfied.

1. Purpose Clause

The purpose clause of the C-3 Zone is found in §59-C-4.360 and provides several alternative grounds for threshold eligibility: (1) the property must front on or have access to heavily traveled major highways for planned or existing pavement of at least six lanes; or (2) constitute locations recommended for the C-3 Zone by the applicable master plan; or (3) be in locations adjacent to properties that are currently developed under the C-3 Zone.

The master plan does not recommend the C-3 Zone for this location despite the fact that it recommended the C-3 Zone for other locations within Town Center core areas. There is no C-3 zoning that has been applied anywhere within the surrounding area and, therefore, the property is not adjacent to properties that are currently developed under the C-3 Zone. While the subject property does lie adjacent to a six-lane highway, this threshold factor in and of itself does not signify compliance with the purpose clause because the C-3 Zone has other elements that must also be met. In other words, not

every location that is next to a six lane highway will necessarily qualify for the C-3 Zone. These other elements of the purpose clause make clear that this location is not appropriate for the C-3 Zone.

The C-3 Zone is intended to provide sites for commercial uses related to the traveler and highway user that may require large land areas, but do not depend on adjacent uses for comparison shopping or pedestrian trade. In this case the Applicant provided conflicting testimony. On one hand, the proposed use is claimed to relate to the highway user and it clearly does. However, the Applicant, apparently recognizing the problem of an intensely automobile dependant use and its incompatibility with a location that is pedestrian-oriented in character, contends that the use will cater to significant pedestrian traffic, a contention that is inconsistent with the purposes of the C-3 Zone. The Applicant's evidence indicates that the convenience store use will be dependent on pedestrians from adjacent uses and will generate more pedestrians than office uses. The Applicant's conflicting evidence reveals that this location, centered as it is within a pedestrian-oriented environment, is not appropriate for the C-3 Zone.

For these reasons, the Application does not meet the requirements of the purpose clause.

2. Compatibility

If the applicant meets the requirements of the purpose clause, compatibility must also be established. The compatibility evaluation must be made on the basis of worst-case uses, that is, the proposed convenience store and automobile filling station. See, *Wheaton Moose Lodge v. Montgomery Co., supra*. The Applicant's evidence of compatibility focuses on the relatively small size of the proposed building. While the proposed building may be compatible, the proposed uses are not. The intensity of use will generate a continual flow of automobile traffic into and out of the site on a 24 hour a day basis. The intensity of this use will seriously impair the quiet, passive and pedestrian character of the area. The use is automobile-dependent and does not conform to the master plan.

The Applicant contends that offices uses will generate more *new* traffic than the proposed use. This contention ignores the fact that full office density has not occurred in this area and office uses

have developed under restrictions recommended by the master plan. The contention also ignores the real impact of the proposed use because it will clearly generate more *total* trips than an office use at this location. These total trips will have a direct and adverse impact on the surrounding area because the trips will access Bowman Mill Drive. The true impact on the surrounding area will be in terms of total traffic trips that will be introduced into this transitional area by way of Bowman Mill Drive for the first time regardless of their point of origin. The Opposition's evidence shows that the pedestrian amenities connected with the construction of Bowman Mill Drive have enhanced the pedestrian character of the area.

The intensity of uses authorized by the C-3 Zone is out of place at this location because it would undermine the transitional function of the area to maintain the quiet, passive and pedestrian oriented character of the area and to buffer the historic resources from the more intensive uses of the Town Center core areas on the other side of Wisteria Drive. Within Analysis Area TC-6, the intensity of uses are planned to diminish as proximity to the Historic District increases in order to protect the character of the Historic District and the nearby Historic Areas. The highest intensity uses within Analysis Area TC-6 are located close to Wisteria Drive. The subject property is planned for a low-intensity office use and not the continual automobile traffic that would be generated by the proposed use.

This transitional area needs to have diminished activity near the Historic District. The proposed development would have an adverse impact on the character of the area because of its level of activity that is not sensitive to the transitional function of the area. The Historic Preservation staff of the M-NCPPC provided persuasive testimony that the zoning application is inconsistent with the recommendations of the master plan because the auto-related uses of the C-3 Zone would be incompatible with the quiet, passive and pedestrian environment envisioned by the master plan. Moreover, the Technical Staff provided persuasive evidence that the proposed development would be

incompatible with the primarily residential Germantown Historic District both visually and in terms of land use.

Finally, the Applicant bases its evidence of compatibility upon design controls that do not apply to the C-3 Zone. The master plan recommended the creation of a protective overlay zone that was never enacted. The current zoning process, in the absence of the recommended overlay zone or additional safeguards at the site plan stage, does not provide the type of design review upon which the Applicant's compatibility evidence relies. Given this gap in the Applicant's burden of proof, the compatibility requirement is not satisfied. However, even with guarantees of good architectural design, the preponderance of evidence shows that the incompatible function of the proposed use would remain.

3. Public Interest

Finally, the applicant must show that the proposed zoning bears sufficient relationship to the public interest to justify its approval. The public interest requirement is found in the State Zoning Enabling Act applicable to Montgomery County and provides that the zoning request be explicitly found to:

“...be with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, ...and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Art. 28, Md. Code Ann. § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and adverse impact on public facilities.

The planning recommendations do not support the proposed zoning. It is interesting to note that the master plan recommended the C-3 Zone for other locations within the Town Center area where more intensive uses were deemed appropriate. However, there are no recommendations for the C-3 Zone anywhere within the relevant surrounding area and the C-3 Zone has not been applied to this area by either comprehensive or piecemeal zoning actions. The master plan does not support auto-oriented uses at this location. Moreover, the Technical Staff and Planning Board rejected the proposal.

While the 1989 master plan is somewhat dated, the recent recommendations of the M-NCPPC indicate that the master plan's recommendation for this particular location is still viable and the C-3 Zone does not conform to planning objectives for this area.

There must be strong public interest factors present to overcome the weight of the planning recommendations for this location. The Applicant presented speculation that lower gasoline prices may result from the rezoning. The Applicant also presented a policy argument that the proposed use would provide necessary convenience services to nearby offices and commuters. These contentions are more appropriate for a master plan update proceeding but they are not relevant to a site-specific zoning request.

The Applicant neglected to provide adequate evidence to show that traffic generated by the proposed development can access the site by way of Bowman Mill Drive in a safe, adequate and efficient manner without adverse impact on existing traffic that uses the road for access to the MARC commuter parking lots. The evidence also indicates that the proposed development will contribute to adverse impacts on several area intersections and the Applicant failed to provide any binding commitment to provide staging until necessary mitigation is provided to offset the impact of the development.

The Applicant has not presented a clear and persuasive case in support of the zoning. The application is riddled with technical and substantive omissions and deficiencies that preclude favorable consideration at this time. A remand may be able to cure some of the deficiencies of the application, although a remand alone will not cure more fundamental problems with the application. There is simply an absence of any public interest justification to support the application.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, we make the following conclusions:

1. That the requested reclassification to the C-3 Zone does not comply with the requirements of the purpose clause of the C-3 Zone;
2. That the requested reclassification to the C-3 Zone, even as restricted by the SDP, will not provide for a compatible form of development in terms of intensity of use; and
3. That the requested reclassification to the C-3 Zone does not bear sufficient relationship to the public interest because it is contrary to relevant planning recommendations for this location and the Applicant failed to establish that the traffic impact of the proposed development can be handled in a safe, adequate and efficient manner without an adverse impact on the area road network.

VII. RECOMMENDATION

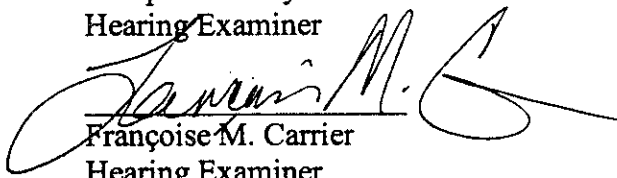
We, therefore, recommend that Zoning Application No. G-788, for the reclassification from the O-M and R-200 Zones to the C-3 Zone of 1.60 acres known as Lot 1, Block A, Bowman Mill Subdivision, located at the southeast quadrant of the intersection of relocated MD Route 118 and Bowman Mill Drive, Germantown, in the 9th Election District, be denied.

Dated: December 7, 2001

Respectfully submitted,



Philip J. Tierney
Hearing Examiner



Françoise M. Carrier
Hearing Examiner

PJT:nzf